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TITLE 16

PRACTICE, PROCEDURE, AND COURTS

(CHAPTERS 1-17 IN VOLUME 14A; CHAPTERS 18-54 IN VOLUME 14B; CHAPTERS 55-89 IN VOLUME 15)

SUBTITLE 6. CRIMINAL PROCEDURE GENERALLY

CHAPTER 90

JUDGMENT AND SENTENCE GENERALLY

Subchapter 1 — General Provisions

16-90-103. Sentences without notice void.

CASE NOTES

Invalid Notice.

Judge's attempt to reduce a one-year sentence following a contempt order to six months was null and void where the trial judge failed to notify either party before amending his original order. Linder v. Weaver, 364 Ark. 319, 219 S.W.3d 151 (2005).

16-90-105. Verdict of guilty.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Annual Survey of Case Law: Criminal Law, 29 U. Ark. Little Rock L. Rev. 849.

CASE NOTES

In General.

This section does not require the voiding of a judgment entered more than 30 days after a court's acceptance of a guilty plea. Ainsworth v. State, 367 Ark. 353, 240 S.W.3d 105 (2006).

Cited: Loar v. State, 368 Ark. 171, 243 S.W.3d 923 (2006).

16-90-107. Fixing of punishment generally.

RESEARCH REFERENCES

ALR. Validity, Construction, and Application of State Statute Including "Sexually Motivated Offenses" Within Definition of Sex Offense for Purposes of Sentencing or Classification of Defendant as Sex Offender. 30 A.L.R.6th 373.

CASE NOTES

Analysis

Discretion of Court.
Fixing by Court.
Modification of Sentence.

Discretion of Court.

Trial court did not abuse its discretion in denying defendant's motion to reduce his life sentence for the rape of his minor daughter as numerous witnesses testified to the alleged abuse of the victim, including the victim herself, and a nurse examiner testified to signs of extensive and ongoing sexual abuse; based on this evidence, the jury's verdict did not appear to be the result of passion or prejudice. McDonald v. State, 364 Ark. 491, 221 S.W.3d 349 (2006).

Fixing by Court.

Use of the word "may" in § 5-4-702 does not mean that a jury has the discretion as to whether to impose an enhanced sentence where a crime of domestic violence was committed in the presence of a child; rather, it means the state had the option of seeking the enhancement. Thus, where

no sentence was imposed by the jury, a trial court did not err by imposing one under this section. Sullivan v. State, 366 Ark. 183, 234 S.W.3d 285 (2006).

Modification of Sentence.

Trial court did not abuse its discretion in denying defendant's post-trial request for a sentence reduction pursuant to subsection (e) of this section because defendant's 20-year sentence for second degree sexual assault, in violation of § 5-14-125, fell within the statutory range. Brown v. State, 2010 Ark. 420, — S.W.3d — (2010).

Cited: Barritt v. State, 372 Ark. 395, 277 S.W.3d 211 (2008); Vance v. State, 2011 Ark. 243, — S.W.3d — (2011).

16-90-111. Correction or reduction of sentence.

(a) Any circuit court, upon receipt of petition by the aggrieved party for relief and after the notice of the relief has been served on the prosecuting attorney, may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided in this section for the reduction of sentence.

(b)(1) The court may reduce a sentence within ninety (90) days after the sentence is imposed or within sixty (60) days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal.

(2) The court may also reduce a sentence upon revocation of probation as provided by law.

History. Acts 1983, No. 431, § 1; A.S.A. 1947, § 43-2314; Acts 1987, No. 550, § 1; 1999, No. 578, § 1.

Publisher's Notes. This section is being set out in its entirety as it was previously set out as "[Superseded]".

This section was declared superseded by ARCrP 37.2(c) in Harris v. State, 318 Ark. 599, 887 S.W.2d 514 (1994). However, in Reeves v. State, 339 Ark. 304, 5 S.W.3d 41 (1999), the Arkansas Supreme Court cited Black's Law Dictionary 1220 (7th ed. 1999) and held that when dealing with a motion to modify a condition contained in a judgment of probation under subsection (b) of this section rather than a petition under ARCrP 37 for postconviction relief following imprisonment, a trial court had the authority to modify an illegal condition of probation under subsection (a) of this section because the defendant was on probation and therefore by definition not in custody.

By per curiam order dated December 19, 1994, the Supreme Court provided: "This court frequently acts on motions filed in the course of appeals of orders denying post-conviction relief pursuant to Arkansas Criminal Procedure Rule 37, Ark. Code Ann. § 16-90-111 (Supp. 1991), statutes which govern the issuance of writs of habeas corpus and mandamus as well as legal remedies such as error coram nobis proceedings and others. As there is no provision in the prevailing rules of procedure for a motion for reconsideration to be filed after this court has denied a motion which stems from a post-conviction matter, such motions will no longer be filed."

CASE NOTES

Considered as a Petition for Postconviction Relief.

Where defendant requested relief based on a claim of ineffective assistance of counsel, defendant's motion for a sentence reduction under this section should have been considered by the trial court as a petition for postconviction relief under Ark. R. Crim. P. 37.1(a). Gonder v. State, 2011 Ark. 248, — S.W.3d — (2011).

Cited: State v. Wilmoth, 369 Ark. 346, 255 S.W.3d 419 (2007); Robertson v. State, 2010 Ark. 300, — S.W.3d — (2010).

16-90-120. Felony with firearm.

(a) Any person convicted of any offense that is classified by the laws of this state as a felony who employed any firearm of any character as a means of committing or escaping from the felony, in the discretion of the sentencing court, may be subjected to an additional period of confinement in the state penitentiary for a period not to exceed fifteen (15) years.

(b) The period of confinement, if any, imposed under this section shall be in addition to any fine or penalty provided by law as punishment for the felony itself. Any additional prison sentence imposed under the provisions of this section, if any, shall run consecutively and not concurrently with any period of confinement imposed for conviction of the felony itself.

(c) A separate appeal may be taken to the Supreme Court from the imposition of the sentence, if any, provided for by this section, and any appeal shall be in the manner prescribed for appellate review of conviction of criminal offenses in general. However, the sole and only question to be decided upon the separate appeal shall be whether the evidence warrants a finding that the defendant actually employed a firearm in the commission of, or escape from commission of, the felony for which he or she stands convicted.

(d) Any reversal of a defendant's conviction for the commission of the felony shall automatically reverse the prison sentence which may be imposed under this section.

(e)(1) For an offense committed on or after July 2, 2007, notwithstanding any law allowing the award of meritorious good time or any other law to the contrary, except as provided in subdivision (e)(1)(B)(ii) of this section, any person who is sentenced under subsection (a) of this section is not eligible for parole or community correction transfer until the person serves:

(A) Seventy percent (70%) of the term of imprisonment to which the person is sentenced under subsection (a) of this section if the underlying felony was any of the following:

(i) Murder in the first degree, § 5-10-102;

(ii) Kidnapping that is a Class Y felony, § 5-11-102;

(iii) Aggravated robbery, § 5-12-103;

(iv) Rape, § 5-14-103; or

(v) Causing a catastrophe, § 5-38-202(a);

(vi) Trafficking methamphetamine, § 5-64-440(b)(1);

(vii) Manufacturing methamphetamine, § 5-64-423(a) or the former § 5-64-401; or

(viii) Possession of drug paraphernalia with the purpose to manufacture methamphetamine, the former § 5-64-403(c)(5).

(B)(i) Except as provided in subdivision (e)(1)(B)(ii) of this section, seventy percent (70%) of the term of imprisonment to which the person is sentenced under subsection (a) of this section if the underlying felony was any of the following:

(a) Manufacturing methamphetamine, § 5-64-423(a) or the former § 5-64-401; or

(b) Possession of drug paraphernalia with the intent to manufacture methamphetamine, the former § 5-64-403(c)(5); or

(c) Trafficking methamphetamine, § 5-64-440(b)(1).

(ii) The person is eligible for parole or community correction transfer if the person serves at least fifty percent (50%) of the term of imprisonment to which the person is sentenced under subsection (a) of this section for the offenses listed in subdivision (e)(1)(B)(i) of this section with credit for the award of meritorious good time under § 12-29-201 unless the person is sentenced to a term of life imprisonment. The time served by any person under this subdivision (e)(1)(B)(ii) shall not be reduced to less than fifty percent (50%) of the person's original sentence under subsection (a) of this section; or

(C) Either one-third (⅓) or one-half (½) of the term of imprisonment to which the person is sentenced under subsection (a) of this section with credit for meritorious good time and depending on the seriousness determination made by the Arkansas Sentencing Commission if the underlying felony was any felony not listed in subdivision (e)(1)(A) or (B) of this section.

(2) The sentencing court may waive subdivision (e)(1) of this section if all of the following circumstances exist:

(A) The defendant was a juvenile when the offense was committed;

(B) The defendant was merely an accomplice to the offense; and

(C) The offense was committed on or after July 31, 2007.

(f) A person who commits the offense of possession of drug paraphernalia with the intent to manufacture methamphetamine, § 5-64-443, after July 27, 2011, shall not be subject to the provisions of this section.

History. Acts 1969, No. 78, §§ 1-3; 1973, No. 61, § 1; A.S.A. 1947, §§ 43-2336 — 43-2338; Acts 2007, No. 1047, § 5; 2011, No. 570, § 76.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2007 amendment added (e).

The 2011 amendment inserted (e)(1)(A)(vi) through (viii); rewrote (e)(1)(B)(i)(*a*); substituted "the former § 5-64-403(c)(5); or" for "§ 5-64-403(c)(5)" in (e)(1)(B)(i)(*b*); inserted (e)(1)(B)(i)(*c*); and added (f).

CASE NOTES

Analysis

In General.

Plain language of the firearm-enhancement statute shows that the legislature intended for it to apply to any offense, in addition to any fine or penalty provided by law as punishment for the felony itself.

McKeever v. State, 367 Ark. 374, 240 S.W.3d 583 (2006).

Additional Confinement.

Defendant's convictions for aggravated assault in violation of § 5-13-204(a) and use of a firearm in commission of a felony did not subject defendant to double jeopardy as the conviction under this section was used to enhance defendant's sentence. Davis v. State, 93 Ark. App. 443, 220 S.W.3d 248 (2005).

In a case involving terroristic acts under § 5-13-310(a)(1) where three shots were fired into an automobile, because each terroristic act was a separate offense that could have been committed with or without a firearm, each crime was subject to a firearm enhancement under this section. McKeever v. State, 367 Ark. 374, 240 S.W.2d 583 (2006).

Construction With Other Laws.

This section, the firearm enhancement statute, was not repealed by implication when the Arkansas Criminal Code became effective in 1976; former § 5-4-505 could be read in harmony with this section, and the general assembly's amendment to this section was inconsistent with the conclusion it had been repealed by implication. Sesley v. State, 2011 Ark. 104, — S.W.3d — (2011).

Firearm Enhancement Statute Not Repealed by Implication.

Fifteen years' imprisonment pursuant to a firearm enhancement was proper because this section was not repealed by implication when the Arkansas Criminal Code became effective; statutes were not in irreconcilable conflict, and the general assembly had validated this section's continued existence by amending it. Neely v. State, 2010 Ark. 452, — S.W.3d — (2010).

Instructions.

Circuit court did not abuse its discretion in denying defendant's second-degree battery instruction because the offense charged was first-degree battery pursuant to § 5-13-201(a)(3), and the jury was not required to find that defendant employed a firearm in order to convict him of that offense, nor was the jury required to apply the firearm enhancement if it convicted defendant of first-degree battery; the firearm enhancement was not an element of the first-degree-battery offense but was an additional sentence authorized by statute if defendant was convicted of first-degree battery, and the jury determined that defendant employed a firearm during commission of that offense as prohibited by this section. Reed v. State, 2011 Ark. App. 352, — S.W.3d — (2011).

Sentencing.

After defendant was convicted of three counts of committing a terroristic act, the trial court did not err in imposing multiple firearm enhancements because defendant committed three separate criminal offenses, and each offense was committed with a firearm. McKeever v. State, 367 Ark. 374, 240 S.W.3d 583 (2006).

Defendant's conviction for murder in the second degree, with a firearm enhancement, was proper because defendant acted knowingly to cause the victim's death under circumstances manifesting extreme indifference to the value of human life. The issues involved credibility and it was presumed that a person intended the natural and probable consequences of his or her acts; defendant shot her husband in the wrist with a handgun, he bled to death as a result of the wound, and additional evidence indicated that the fatal wound was defensive in nature. Johnson v. State, 2010 Ark. App. 153, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 257 (May 6, 2010).

Defendant's sentence enhancement pursuant to subsection (a) of this section, which allowed discretionary enhancement for using a firearm as a means of committing a felony, was proper because defendant's accomplice liability for the underlying offense of murder, that was committed by use of a firearm, was sufficient for the statutory enhancement to apply. Mhoon v. State, 2010 Ark. App. 183, — S.W.3d — (2010).

Summary denial of an inmate's Ark. R. Crim. P. 37.1 postconviction relief petition was reversed because the order did not provide the requisite findings and conclusions, and the record did not clearly support affirmation; because no hearing was held, the trial court had an obligation to provide written findings that showed that the inmate was entitled to no relief. It was not conclusive from the petition or the record that relief was not warranted on the inmate's claims concerning illegal sen-

tencing as there was no evidence that counsel agreed to allow the court to sentence on a gun enhancement charge. Davenport v. State, 2011 Ark. 105, — S.W.3d — (2011).

Cited: Polivka v. State, 2010 Ark. 152, — S.W.3d — (2010).

16-90-122. Post-conviction release of nonviolent offenders.

(a) Except as provided in subsection (b) of this section, any circuit judge may authorize the temporary release of an offender in the sheriff's custody who has:

(1) Been found guilty of or pleaded guilty or nolo contendere to a nonviolent felony offense in circuit court; and

(2) Been sentenced to a term of imprisonment and committed to the Department of Correction or the Department of Community Correction and is awaiting transfer to the Department of Correction or the Department of Community Correction.

(b) A circuit judge shall not authorize the temporary release of an offender under subsection (a) of this section if the offender has been found guilty of or pleaded guilty or nolo contendere to a:

(1) Class Y felony offense listed in § 16-93-618; or

(2) Felony sex offense listed in the definition of "sex offense" in § 12-12-903.

(c)(1) The circuit judge may authorize the release under the terms and conditions that he or she determines are necessary to protect the public and to ensure the offender's return to custody upon notice that bed space is available at the Department of Correction or the Department of Community Correction.

(2) The circuit judge may require a cash or professional bond to be posted in an amount suitable to ensure the offender's return to custody.

History. Acts 2005, No. 1261, § 1; 2007, No. 279, § 1; 2011, No. 570, § 77.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2007 amendment, in (a), inserted "Except as provided in subsection (b) of this section" in the introductory language, and deleted "except nonviolent Class Y felony offenses listed in § 16-93-611" at the end of (a)(1); inserted present (b) and redesignated the following subdivision accordingly; inserted "circuit" in (c)(1) and (c)(2); and made related changes.

The 2011 amendment substituted "§ 16-93-618" for "§ 16-93-611" in (b)(1).

CASE NOTES

Applicability.

Allowing defendant's release on a bed-space bond was erroneous because the release of offenders was only allowed if they were nonviolent in nature; defendant pled guilty to two counts of unlawful discharge of a firearm from a vehicle, which was a crime of violence under § 5-74-103. State v. Britt, 368 Ark. 273, 244 S.W.3d 665 (2006).

Subchapter 3 — Restitution to Victims

16-90-301. Legislative determination.

RESEARCH REFERENCES

ALR. Mandatory Victims Restitution Act — Constitutional Issues. 20 A.L.R. Fed. 2d 239.

Subchapter 5 — Execution of Sentence — Death Penalty

16-90-502. Conduct of execution.

CASE NOTES

Public Access.

Mere fact that subdivision (d)(2) of this section requires that between six to twelve respectable citizens be present at an execution to verify that the execution was conducted in compliance with § 5-4-617(a)(1) does not transform executions, which subdivision (d)(1) of this section states are private, into a public proceeding comparable to a criminal trial. Because Arkansas does not have an enduring tradition of public executions, the mere fact that full public access to executions could play a significant role in the proper functioning of capital punishment and could better inform the public debate about execution by lethal injection is not a sufficient basis for reading a right of public access to executions into U.S. Const., Amend. I. Arkansas Times, Inc. v. Norris, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 3500 (E.D. Ark. Jan. 7, 2008).

42 U.S.C.S. § 1983 suit challenging the Arkansas Department of Correction's (ADC) lethal injection procedures was dismissed under Fed. R. Civ. P. 12(b)(6): (1) in the suit, a newspaper publisher, a newspaper editor, and a journalists' society challenged the ADC's legal injection procedures, claiming that the procedures violated their U.S. Const., Amend. I rights because those procedures did not open up the entire execution process to public view; (2) subdivision (d)(1) of this section made clear that executions were private, and not public, proceedings; (3) the U.S. Supreme Court had not recognized a First Amendment right of access to executions and had held that neither the public nor the media had a U.S. Const., Amends. I, XIV, right to access private areas of prisons; and (4) the fact that § 5-4-617(a)(1) required the presence of witnesses to verify that executions were conducted in compliance with § 5-4-617(a)(1) did not transform executions into public proceedings or render them comparable to criminal trials, in which full public access was constitutionally required. Arkansas Times, Inc. v. Norris, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 3500 (E.D. Ark. Jan. 7, 2008).

Subchapter 7 — Crime Victims Reparations

SECTION.

Effective Dates. Acts 2011, No. 11, § 2: Feb. 7, 2011. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the Attorney General has immediate staffing needs in other areas of the agency; and that this act is immediately necessary because it will allow the Attor-

ney General the flexibility to assign existing staff to work in other areas of the agency in addition to their responsibilities for the Crime Victims Reparations program. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

16-90-706. Powers of board — Logistical support.

(a)(1) The Crime Victims Reparations Board shall have:

(A) Power to award reparations for economic loss arising from criminally injurious conduct if satisfied by a preponderance of the evidence that the requirements for reparations have been met; and

(B) Authority to award the reparations to the claimant or directly to the provider of services.

(2) The board shall:

(A) Hear and determine all matters relating to claims for reparations, including having the power to reinvestigate or reopen claims without regard to statutes of limitation; and

(B)(i) Have discretion to act in a panel of three (3) or more members.

(ii) This panel may exercise the powers granted to the board.

(3) The board shall have the power to subpoena witnesses and compel their attendance, require the production of records and other evidence, administer oaths or affirmations, conduct hearings, and receive relevant evidence.

(4)(A) The board shall be provided such office, support staff, and secretarial services as necessary by the office of the Attorney General.

(B) The support staff and secretarial services described in subdivision (a)(4)(A) of this section may also be assigned by the Attorney General to engage in additional legal work in other areas that do not involve crime victims reparations.

(b) In addition to any other powers and duties specified elsewhere in this subchapter, the board may:

(1) Regulate its own procedure, except as otherwise provided in this subchapter;

(2) Adopt rules and regulations to implement the provisions of this subchapter;

(3) Define any term not defined in this subchapter;

(4) Prescribe forms necessary to carry out the purposes of this subchapter;

(5) Request access to any reports of investigations or other data necessary to assist the board in making a determination of eligibility for reparations under the provisions of this subchapter;

(6) Take judicial notice of general, technical, and scientific facts within its specialized knowledge; and

(7) Publicize the availability of reparations and information regarding the filing of claims for reparations.

History. Acts 1987, No. 817, §§ 5, 6; 2011, No. 11, § 1.

Amendments. The 2011 amendment added the (a)(4)(A) designation and (a)(4)(B).

16-90-717. Crime Victims Reparations Revolving Fund.

A.C.R.C. Notes. Acts 2010, No. 238, § 60, provided: "YEARLY FUND TRANSFERS. On July 1, 2010 and each July 1, thereafter, if the fund balance of the Crime Victims Reparation Revolving Fund falls below one million dollars ($1,000,000), the Chief Fiscal Officer of the State may transfer on his or her books and those of the State Treasurer and the Auditor of the State a sum not to exceed one million dollars ($1,000,000) or so much thereof as is available from fund balances that exceed seven million dollars ($7,000,000) as determined by the Chief Fiscal Officer of the State, from the State Administration of Justice Fund to the Crime Victims Reparations Revolving Fund to provide funds for personal services, operating expenses and claims for the Office of the Attorney General — Crime Victims Reparations Program.

"The provisions of this section shall be in effect only from July 1, 2010 through June 30, 2011."

Acts 2011, No. 1103, § 61, provided: "YEARLY FUND TRANSFERS. On July 1, 2010 and each July 1, thereafter, if the fund balance of the Crime Victims Reparation Revolving Fund falls below one million dollars ($1,000,000), the Chief Fiscal Officer of the State may transfer on his or her books and those of the State Treasurer and the Auditor of the State a sum not to exceed one million dollars ($1,000,000) or so much thereof as is available from fund balances that exceed seven million dollars ($7,000,000) as determined by the Chief Fiscal Officer of the State, from the State Administration of Justice Fund to the Crime Victims Reparations Revolving Fund to provide funds for personal services, operating expenses and claims for the Office of the Attorney General — Crime Victims Reparations Program.

"The provisions of this section shall be in effect only from July 1, 2011 through June 30, 2012."

Subchapter 8 — Sentencing Guidelines

SECTION.

16-90-801. Statement of sentencing policy.

CASE NOTES

Cited: Barritt v. State, 372 Ark. 395, 277 S.W.3d 211 (2008).

16-90-802. The Arkansas Sentencing Commission.

(a) There is hereby created the Arkansas Sentencing Commission, the purpose of which is to evaluate the effect of sentencing laws, policies, and practices on the criminal justice system, to make appropriate and necessary revision to the sentencing standards, and to make recommendations to the legislature on proposed changes of sentencing laws, policies, and practices.

(b)(1) The commission shall be composed of nine (9) voting members and two (2) advisory members.

(2)(A) One (1) advisory member shall be appointed by and serve at the pleasure of the chair of the Senate Judiciary Committee.

(B) One (1) advisory member shall be appointed by and serve at the pleasure of the chair of the House Judiciary Committee.

(3) The voting members of the commission shall be composed of:

(A) Three (3) circuit judges;

(B) Two (2) prosecuting attorneys;

(C) Two (2) public defenders or private attorneys whose practices consist primarily of criminal defense work; and

(D) Two (2) private citizen members.

(c)(1)(A) The Governor shall appoint the voting members of the commission.

(B) All voting members shall serve for a term of five (5) years, unless they resign or are removed. Members shall serve until their replacements are appointed. Vacancies occurring before the expiration of a term shall be filled in the manner provided for members first appointed.

(2) The Governor shall select a chair to serve at his or her will.

(3) Members of the commission may receive expense reimbursement and stipends in accordance with § 25-16-901 et seq.

(d) In furtherance of its purpose, the commission shall have the following powers and duties:

(1)(A) The commission shall adopt an initial sentencing standards grid and an offense seriousness reference table based upon the statutory parameters and additional data and information gathered prior to January 1, 1994.

(B) The commission shall also set the percentage of time within parameters set by law to be served for offenses at each seriousness level prior to any type of transfer or release;

(2)(A) The commission shall periodically review and may revise the voluntary sentencing standards.

(B) Any revision of the standards shall be in compliance with provisions applicable to rule making contained in the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(C) Any revision of the standards shall become effective as provided by the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(D)(i) The revised standards will be in effect unless modified by the General Assembly at its next session or until revised again by the commission.

(ii) Any revisions by the commission shall be within the statutory parameters set for the various crime classes;

(3) The commission may review and make recommendations for revision of the Community Punishment Act, § 16-93-1201 et seq., target group to the General Assembly such that nonviolent offenses and offenders are routinely handled in community punishment programs;

(4)(A) The commission shall be in charge of strategic planning for a balanced correctional plan for the state.

(B) The commission shall develop such a plan in conjunction with the Board of Corrections.

(C) The commission shall monitor compliance with sentencing standards, assess their impact on the correctional resources of the state with the assistance of the board, and determine if the standards further the adopted sentencing policy goals of the state;

(5) The commission may review the classifications of crimes and sentences and make recommendations for change when supported by information that change is advisable to further the adopted sentencing policy goals of the state;

(6)(A) The commission shall develop a research and analysis system to determine the feasibility, impact on resources, and budget consequences of any proposed or existing legislation affecting sentence length.

(B) The commission shall prepare and submit to the General Assembly a report on any such legislation prior to its adoption;

(7)(A)(i) All courts having criminal jurisdiction of felony crimes shall provide to the commission in a timely manner all information deemed necessary by the commission.

(ii) Such information shall be in the form determined necessary by the commission.

(B) The commission shall have the authority to collect from any state or local governmental entity information, data in electronic or in other usable form, reports, statistics, or such other material which relates to sentencing laws, policies, and practices, or impacts on correctional resources or is necessary to carry out the commission's functions.

(C) The commission may coordinate its data collection with the Administrative Office of the Courts, the Arkansas Crime Information Center, the various circuit clerks of the state, and the various state and local correctional agencies;

(8) Under its duties outlined in this section, the commission shall be a criminal justice agency, as defined in § 12-12-1001(8), as its powers and duties include:

(A) Determining transfer eligibility;

(B) Gathering, analyzing, and disseminating criminal history information as it relates to sentencing practices, dispositions, and release criteria; and

(C) Determining the appropriate use of correctional and rehabilitative resources of the state;

(9)(A) Produce annual reports regarding compliance with sentencing guidelines, including the application of voluntary presumptive standards, § 16-90-803, and departures from the standards, § 16-90-804.

(B) The report shall include:

(i) Data collected from each county; and

(ii) Both a county-by-county and statewide accounting of the results including without limitation:

(a) Sentences to the Department of Correction and Department of Community Correction;

(b) The average sentence length for sentences by offense type and severity level according to the sentencing guidelines;

(c) The percentage of sentences that are an upward departure from the sentencing guidelines; and

(d) The average number of months above the recommended sentence for those sentences described in subdivision (d)(9)(B)(ii)(*c*).

(C) The report filed each year after the initial report submitted under this section shall include data from prior years;

(10) Prepare and conduct annual continuing legal education seminars regarding the sentencing guidelines to be presented to judges, prosecuting attorneys and their deputies, and public defenders and their deputies, as so required; and

(11)(A) The commission shall collaborate with the Administrative Office of the Courts to develop and implement an integrated sentencing commitment and departure form that shall include:

(i) Demographic information including the race and ethnicity of both the offender and the victim or victims;

(ii) The placement decision;

(iii) Sentence length;

(iv) Any departure from the sentencing guidelines on placement and sentence length;

(v) The number of months above or below the presumptive sentence;

(vi) Justification for the departure; and

(vii) A signature space for the judge and the prosecuting attorney to sign off on the contents of the form.

(B) The commission shall begin using the new form on January 1, 2012.

(C)(i) Forms are to be collected annually and sent to the Administrative Office of the Courts.

(ii) Data from the forms shall be collected and submitted to the Chair of the House Judiciary Committee and the Chair of the Senate Judiciary Committee.

(e)(1) The commission shall meet no less than quarterly.

(2)(A) The commission shall submit to the Governor, the General Assembly, and the Arkansas Judicial Council a biennial report three (3) months prior to the convening of the regular session.

(B) The report shall include a summary of the commission proceedings and recommendations for legislative and administrative action.

(f)(1) The commission shall employ an executive director from candidates presented to it by the chair.

(2) The executive director shall have appropriate training and experience to assist the commission in the performance of its duties.

(3) The executive director shall be responsible for compiling the work of the commission and drafting suggested legislation incorporating the commission's findings for submission to the General Assembly.

(g)(1) Subject to the approval of the chair, the executive director shall employ such other staff and shall contract for services as are necessary to assist the commission in the performance of its duties, and as funds permit.

(2) The executive director shall ensure that appropriate budgetary measures are taken to employ enough staff or contract for expert services and to purchase the technology needed to compile and process sentencing data from all judicial districts in a timely manner.

History. Acts 1993, No. 532, § 4; 1993, No. 550, § 4; 1995, No. 1170, § 6; 1997, No. 250, § 119; 2001, No. 1288, § 14; 2009, No. 962, § 36; 2011, No. 570, §§ 78, 79.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2009 amendment substituted "regular session" for "next regularly scheduled legislative session" in (e)(2)(A).

The 2011 amendment added (d)(9) through (d)(11); and added the (g)(1) designation and (g)(2).

16-90-803. Voluntary presumptive standards.

RESEARCH REFERENCES

ALR. Construction and Application of United States Sentencing Guideline § 2A2.1(b)(1), 18 U.S.C.A., Providing Enhancement for Attempted Murder or Assault with Intent to Commit Murder Dependent Upon Nature or Degree of Injury. 30 A.L.R. Fed. 2d 385.

Construction and Application of "Official Victim" Sentencing Enhancement of U.S.S.G. § 3A1.2(c) Concerning Law Enforcement Officers and Prison Officials. 32 A.L.R. Fed. 2d 371.

Construction and Application of U.S.S.G. § 3B1.1(s) Providing Sentencing Enhancement for Organizer or Leader of Criminal Activity — Fraud Offenses. 32 A.L.R. Fed. 2d 445.

Downward Adjustment for Acceptance of Responsibility Under U.S.S.G. § 3E1.1, 18 USCS — Fraud Offenses. 33 A.L.R. Fed. 2d 477.

Construction and Application of U.S.S.G. § 5H1.3, Concerning Mental and Emotional Conditions as Ground for Sentencing Departure. 34 A.L.R. Fed. 2d 457.

Construction and Application of U.S.S.G. § 3B1.1(b) Providing Sentencing Enhancement For Manager or Supervisor of Criminal Activity — Drug Offenses — Cocaine. 35 A.L.R. Fed. 2d 467.

Validity, Construction, and Application of U.S.S.G. § 5K2.8, Providing for Upward Sentence Departure for Extreme Conduct. 36 A.L.R. Fed. 2d 95.

Construction and Application of U.S.S.G. § 2X1.1, Providing Sentencing Guideline for Conspiracy Not Covered by Specific Offense Guideline. 37 A.L.R. Fed. 2d 449.

Construction and Application of U.S.S.G., § 3B1.1(a), 18 USCS, Providing Sentencing Enhancement for Organizer or Leader of Criminal Activity — Drug Offenses. 43 A.L.R. Fed. 2d 365.

U. Ark. Little Rock L. Rev. Survey of Legislation, 2005 Arkansas General Assembly, Practice, Procedure, and Courts, 28 U. Ark. Little Rock L. Rev. 377.

16-90-804. Departures from the standards.

RESEARCH REFERENCES

ALR. Construction and Application of United States Sentencing Guideline § 2A2.1(b)(1), 18 U.S.C.A., Providing Enhancement for Attempted Murder or Assault with Intent to Commit Murder Dependent Upon Nature or Degree of Injury.

30 A.L.R. Fed. 2d 385.

Construction and Application of "Official Victim" Sentencing Enhancement of U.S.S.G. § 3A1.2(c) Concerning Law Enforcement Officers and Prison Officials. 32 A.L.R. Fed. 2d 371.

Construction and Application of U.S.S.G. § 3B1.1(s) Providing Sentencing Enhancement for Organizer or Leader of Criminal Activity — Fraud Offenses. 32 A.L.R. Fed. 2d 445.

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Construction and Application of U.S.S.G. § 5H1.3, Concerning Mental and Emotional Conditions as Ground for Sentencing Departure. 34 A.L.R. Fed. 2d 457.

Construction and Application of U.S.S.G. § 3B1.1(b) Providing Sentencing Enhancement For Manager or Supervisor of Criminal Activity — Drug Offenses — Cocaine. 35 A.L.R. Fed. 2d 467.

Validity, Construction, and Application of U.S.S.G. § 5K2.8, Providing for Upward Sentence Departure for Extreme Conduct. 36 A.L.R. Fed. 2d 95.

Construction and Application of U.S.S.G. § 2X1.1, Providing Sentencing Guideline for Conspiracy Not Covered by Specific Offense Guideline. 37 A.L.R. Fed. 2d 449.

Construction and Application of U.S.S.G., § 3B1.1(a), 18 USCS, Providing Sentencing Enhancement for Organizer or Leader of Criminal Activity — Drug Offenses. 43 A.L.R. Fed. 2d 365.

Ark. L. Rev. Note, Hurricane Blakely and the Calm After the Storm Found in Booker, 58 Ark. L. Rev. 449.

U. Ark. Little Rock L. Rev. Survey of Legislation, 2005 Arkansas General Assembly, Practice, Procedure, and Courts, 28 U. Ark. Little Rock L. Rev. 377.

Annual Survey of Case Law: Criminal Law, 29 U. Ark. Little Rock L. Rev. 849.

CASE NOTES

Cited: Burton v. State, 367 Ark. 109, 238 S.W.3d 111 (2006); Bell v. State, 371 Ark. 375, 266 S.W.3d 696 (2007).

Subchapter 9 — Expungement and Sealing of Criminal Records

SECTION.

16-90-901. Definition.

(a)(1) As used in §§ 5-64-407, 16-90-601, 16-90-602, 16-90-605, 16-93-301 — 16-93-303, 16-93-314, and 16-93-1207, "expunge" shall mean that the record or records in question shall be sealed, sequestered, and treated as confidential in accordance with the procedures established by this subchapter.

(2) Unless otherwise provided by this subchapter, "expunge" shall not mean the physical destruction of any records.

(3) No person who is found guilty of or pleads guilty or nolo contendere to a sexual offense as defined in this section and in which the victim was under the age of eighteen (18) years shall be eligible to have the offense expunged under the procedures set forth in this subchapter.

(b) For purposes of this subchapter, "sexual offense" shall be defined as conduct prohibited by § 5-14-101 et seq., §§ 5-26-202, 5-27-602,

5-27-603, 5-27-605, 16-93-303(a)(1)(B), and any other subsequently enacted criminal law prohibiting sexual conduct with a child.

History. Acts 1995, No. 998, § 7; 1999, No. 1407, § 3; 2003, No. 1390, § 7; 2003, No. 1753, § 1; 2011, No. 570, § 80.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment, in (a)(1), deleted "5-4-311" following "§§ 5-64-407" and inserted "16-93-314."

CASE NOTES

Analysis

Eligibility.
Physical Destruction Not Required.

Eligibility.

Defendant's property crime convictions from 1989 were ineligible for expungement under Act 531, codified as this section, because Act 531 was not enacted until 1993 and was not in effect on the date of defendant's crimes in April 1989. Therefore, the circuit court erred in entering an order to seal defendant's convictions. State v. Tyler, 2010 Ark. 307, — S.W.3d — (2010).

Physical Destruction Not Required.

Physical destruction of records is not contemplated by Arkansas law; therefore, summary judgment was properly granted to the Arkansas Crime Information Center (ACIC) and other parties in an action alleging a violation of an arrestee's civil rights because there was no requirement that the ACIC physically destroy expunged records under § 16-90-901(a)(1)(2)., and dissemination of the expunged records was allowed to criminal justice agencies for criminal justice purposes under § 12-12-1008. Jones v. Huckabee, 369 Ark. 42, 250 S.W.3d 241 (2007).

16-90-902. Effect of expungement.

CASE NOTES

In General.

Trial court properly admitted an appellant's prior conviction for sexually abusing his step-granddaughter under the pedophile exception to Ark. R. Evid. 404(b) where he failed to include in the record either a petition to seal, order to seal, or notice of expungement, as required by § 16-90-902 (Supp. 1995), or a court order of expungement, as required by former § 16-93-303(b)(1) (amended 1995). Davidson v. State, 363 Ark. 86, 210 S.W.3d 887 (2005).

Circuit court did not err in affirming the decision of the Arkansas State Board of Education to deny an applicant's waiver request for a certified teacher's license pursuant to § 6-17-410(c) because given the plain meaning of § 6-17-410(d)(1)(A)(v), there was no abuse of discretion in the Board's decision that the phrase "expunged or pardoned conviction" related to both any sexual or physical abuse offense committed against a child and any offense in § 6-17-410(c); when construing § 6-17-410(c) just as it reads and giving meaning and effect to every word within the statute, it is clear that the General Assembly intended for all who have pled guilty or nolo contendere to a disqualifying offense to be prohibited from receiving a teaching license, regardless of whether the individual's record has since been expunged. Landers v. Ark. Dep't of Educ., 2010 Ark. App. 312, — S.W.3d — (2010).

Cited: Jones v. Huckabee, 369 Ark. 42, 250 S.W.3d 241 (2007).

16-90-904. Procedure for sealing of records.

(a)(1) An individual who is eligible to have an offense expunged may file a uniform petition to seal records, as described in § 16-90-905, in the circuit court or district court in the county where the crime was committed and in which the person was convicted for the offense he or she is now petitioning to have expunged.

(2)(A) Unless the court is presented with and finds that there is clear and convincing evidence that a misdemeanor conviction should not be expunged under this subchapter, the court shall expunge the misdemeanor conviction for a person after the person files a petition as described in this section, except for the following offenses:

(i) Negligent homicide, § 5-10-105, if it was a Class A misdemeanor;

(ii) Battery in the third degree, § 5-13-203;

(iii) Indecent exposure, § 5-14-112;

(iv) Public sexual indecency, § 5-14-111;

(v) Sexual assault in the fourth degree, § 5-14-127;

(vi) Domestic battering in the third degree, § 5-26-305; or

(vii) Driving while intoxicated, § 5-65-103.

(B) An offense listed in subdivisions (a)(2)(A)(i)-(vi) of this section:

(i) May be expunged after a period of five (5) years has elapsed since the completion of the person's sentence for that conviction; and

(ii) Shall be expunged after the period of time required in subdivision (a)(2)(B)(i) of this section unless the court is presented with and finds that there is clear and convincing evidence that the misdemeanor conviction should not be expunged under this subchapter.

(b)(1)(A) A copy of the uniform petition for sealing of the record shall be served upon the prosecuting authority for the county in which the petition is filed, the arresting agency, and any city court or district court where the individual appeared before the transfer of the case to circuit court.

(B) It shall not be necessary to make any agency a party to the action.

(2)(A) Any person desiring to oppose the sealing of the record shall file a notice of opposition with the court setting forth reasons within thirty (30) days after receipt of the uniform petition or after the uniform petition is filed, whichever is the later date.

(B) If no opposition is filed, the court may grant the petition.

(C) If notice of opposition is filed, the court shall set the matter for a hearing.

(c) If the court determines that the record should be sealed, the uniform order, as described in § 16-90-905, shall be entered and filed with the circuit clerk.

(d) The circuit clerk shall certify copies of the uniform order to the prosecuting attorney who filed the underlying charges, the arresting agency, any city court or district court where the individual appeared

before the transfer of the case to circuit court, the Administrative Office of the Courts, and the Arkansas Crime Information Center.

(e)(1) The circuit clerk and the clerk of any city court or district court where the individual appeared before the transfer of the case to circuit court shall remove all petitions, orders, docket sheets, and documents relating to the case, place them in a file, and sequester them in a separate and confidential holding area within the clerk's office.

(2)(A) A docket sheet shall be prepared to replace the sealed docket sheet.

(B) The replacement docket sheet shall contain the docket number, a statement that the case has been sealed, and the date that the order to seal the record was issued.

(3) All indices to the file of the individual with a sealed record shall be maintained in a manner to prevent general access to the identification of the individual.

(f) Upon notification of an order to seal records, all circuit clerks, city clerks, district clerks, arresting agencies, and other criminal justice agencies maintaining such conviction records in a computer-generated database shall either segregate the entire record into a separate file or ensure by other electronic means that the sealed record shall not be available for general access unless otherwise authorized by law.

History. Acts 1995, No. 998, § 7; 2009, No. 477, § 1; 2011, No. 626, § 3.

Amendments. The 2009 amendment subdivided (b)(1) and inserted "and any city court or district court where the individual appeared before the transfer of the case to circuit court" in (b)(1)(A); inserted "any city court or district court where the individual appeared before the transfer of the case to circuit court" in (d); inserted "city clerks, district clerks" in (f); and made related and minor stylistic changes.

The 2011 amendment substituted "in the circuit or district court in the county where the crime was committed and in which the person was convicted for the offense he or she is now petitioning to have expunged" for "with the circuit court in the county where the crime was committed" in (a); and added (a)(2).

CASE NOTES

Cited: Jones v. Huckabee, 369 Ark. 42, 250 S.W.3d 241 (2007).

16-90-905. Uniform petition and order to seal records.

CASE NOTES

Cited: Jones v. Huckabee, 369 Ark. 42, 250 S.W.3d 241 (2007).

16-90-906. When no guilty verdict.

CASE NOTES

Physical Destruction Not Required.

Physical destruction of records is not contemplated by Arkansas law; therefore, summary judgment was properly granted to the Arkansas Crime Information Center (ACIC) and other parties in an action

alleging a violation of an arrestee's civil rights because there was no requirement that the ACIC physically destroy expunged records under § 16-90-901(a)(1)(2)., and dissemination of the expunged records was allowed to criminal justice agencies for criminal justice purposes under § 12-12-1008. Jones v. Huckabee, 369 Ark. 42, 250 S.W.3d 241 (2007).

Subchapter 12 — Encouragement of Treatment and Rehabilitation of Drug Users

SECTION.
16-90-1201. Expungement of record.

16-90-1201. Expungement of record.

(a) The record of a felony offense for possession of a controlled substance or counterfeit substance in violation of § 5-64-419, § 5-64-441, or the former § 5-64-401(c) shall be expunged under this section.

(b) This section shall apply if:

(1) The intake officer appointed by the court determines that the defendant has a drug addiction and recommends the defendant as a candidate for residential drug treatment;

(2) The court places the defendant on probation and includes as part of the terms and conditions of the probation that:

(A) The defendant successfully complete a drug treatment program approved by the court; and

(B) The defendant remain drug free until successful completion of probation; and

(3) The defendant successfully complete the terms and conditions of the probation.

(c) Nothing in this section shall require or compel any court of this state to order probation under this section, nor shall any defendant be availed the benefit of this section as a matter of right.

(d) This section shall be supplemental to all other laws concerning probation and expungement.

(e) As used in this section, the procedure, effect, and definition of "expungement" shall be in accordance with that established in § 16-90-901 et seq.

History. Acts 2001, No. 1778, § 1; 2011, No. 570, §, 81.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment, in (a), inserted "§ 5-64-419, § 5-64-441, or the former."

Subchapter 13 — Earned Discharge and Completion of Sentence

SECTION.
16-90-1301. Scope.
16-90-1302. Applicable felonies.
16-90-1303. Procedure.
16-90-1304. Application.
16-90-1305. Notice and effect.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

16-90-1301. Scope.

This subchapter shall apply to all applicable felony sentences entered on or after the effective date of the act.

History. Acts 2011, No. 570, § 82.

16-90-1302. Applicable felonies.

(a) The following felony offenses shall be eligible for earned discharge and completion of the sentence under this subchapter:

(1) All Class D, Class C, and Class B felonies, except:

(A) An offense for which sex offender registration is required under the Sex Offender Registration Act of 1997, § 12-12-901 et seq.;

(B) A felony involving violence under § 5-4-501(d)(2);

(C) Kidnapping, § 5-11-102;

(D) Manslaughter, § 5-10-104; or

(E) Driving while intoxicated, § 5-65-103; and

(2) All Class A felony controlled substance offenses, § 5-64-401 et seq.

(b) A Class Y felony shall not be eligible for earned early discharge and completion of sentence under this subchapter.

History. Acts 2011, No. 570, § 82.

16-90-1303. Procedure.

(a) If a person is incarcerated for an eligible felony, whether by an immediate commitment or after his or her probation is revoked, and after he or she is moved to community supervision through parole or transfer by the Parole Board, or if he or she is placed on probation, he or she is immediately eligible to begin earning daily credits that shall count toward reducing the number of days he or she is otherwise required to serve until he or she has completed the sentence.

(b)(1) Credits equal to thirty (30) days per month for every month that the offender complies with court-ordered conditions and a set of predetermined criteria established by the Department of Community Correction in consultation with judges, prosecuting attorneys, and defense counsel shall accrue while the person is on parole or probation.

(2) The department shall calculate the number of days the person has remaining to serve on parole or probation before that person completes his or her sentence.

(3) The number of days shall be recalculated on a monthly basis to reflect the application of any credits earned under this subchapter.

(c)(1)(A) The department shall have sole discretion to forfeit any credits a person earns under this subchapter unless otherwise provided for in this section.

(B) The award or forfeiture of any credits earned under this subchapter is not subject to appeal or judicial review.

(2) A person convicted of another felony offense while on parole or probation may result in the forfeiture of any credits earned under this subchapter.

History. Acts 2011, No. 570, § 82.

16-90-1304. Application.

(a) When a person has accumulated enough days, through a combination of served and earned time equal to the total number of days of the sentence imposed by the sentencing court, he or she shall have attained completion of his or her sentence under this subchapter.

(b)(1) No less than seven (7) days before the discharge date, the Department of Community Correction shall submit notice to:

(A) The prosecuting attorney; and

(B) The Parole Board.

(2) Within thirty (30) days before the discharge date, the prosecuting attorney or the Parole Board may file a petition in the sentencing court stating any reasonable objection to early discharge under this subchapter warranting the forfeiture of earned-discharge credit.

(3) If a petition stating an objection under subdivision (b)(2) of this section is lodged, the department shall immediately suspend the discharge of the sentence pending a review of the evidence contained in the objection by the sentencing court.

(4) A review shall be conducted in the sentencing court within fourteen (14) days of the filing of the petition.

(5)(A) Upon the request of the prosecuting attorney or the Parole Board, the sentencing court shall consider the objections against the person based solely on the information contained in the petition.

(B) The sentencing court shall determine, based on a preponderance of the evidence, whether the person should not be discharged from the sentence because, if the information contained in the petition had been known to the Department of Community Correction, the department would have ordered the forfeiture of any of the discharge credit earned to that point or if insufficient evidence exists that would warrant the forfeiture of discharge credit.

(C) If the sentencing court finds sufficient evidence warranting a forfeiture of discharge credits, the department shall make the necessary forfeiture of earned discharge credit appropriate for the type of misconduct asserted in the objection.

(D)(1) If the sentencing court does not find sufficient evidence exists that warrants forfeiture of discharge credits, the department shall discharge the person immediately if the date upon which the completion of the sentence occurred has passed.

(2) If the date for completion of the sentence has not occurred, the person shall return to the status held at the point the objection was filed.

(6) An appeal may not be taken by either party from the sentencing court's findings or the department's decision for early discharge.

History. Acts 2011, No. 570, § 82.

16-90-1305. Notice and effect.

(a) Notice of the discharge of the person's sentence under this section shall be sent to the clerk of the sentencing court.

(b) The clerk of the court shall send notice to the Arkansas Crime Information Center.

(c) A person who earns discharge and completion of his or her sentence under this subchapter is considered as having completed his or her sentence in full and is not subject to parole or probation revocation for those sentences.

History. Acts 2011, No. 570, § 82.

CHAPTER 91

APPEAL AND POST-CONVICTION

SUBCHAPTER.
1. Appeal.

Subchapter 1 — Appeal

SECTION.
16-91-110. Bail bond.

16-91-110. Bail bond.

(a) The bail bond provided for in this section shall be filed in the office of the clerk of the court in which the conviction is had, and a copy thereof shall be attached to the bill of exceptions and shall be made a part of the transcript to be filed in the Supreme Court.

(b)(1) Except those offenses provided for in subdivisions (b)(2) and (3) of this section, when a criminal defendant has been found guilty of or pleaded guilty or nolo contendere to a criminal offense and is sentenced to serve a term of imprisonment, and the criminal defendant has filed an appeal, the court shall not release the defendant on bail or otherwise pending appeal unless the court finds:

(A) By clear and convincing evidence that the person is not likely to flee or that there is not a substantial risk that the defendant will commit a serious crime, intimidate witnesses, harass or take retaliatory action against any juror, or otherwise interfere with the administration of justice or pose a danger to the safety of any other person; and

(B) That the appeal is not for the purpose of delay and that it raises a substantial question of law or fact.

(2) When a criminal defendant has been found guilty of or pleaded guilty or nolo contendere to a criminal offense of capital murder, § 5-10-101, the court shall not release the defendant on bail or otherwise pending appeal or for any reason.

(3) When a criminal defendant has been found guilty, pleaded guilty, or pleaded nolo contendere to a criminal offense of murder in the first degree, § 5-10-102, rape, § 5-14-103, aggravated robbery, § 5-12-103, or causing a catastrophe, § 5-38-202(a), or the criminal offense of kidnapping, § 5-11-102, or arson, § 5-38-301, when classified as Class Y felonies, manufacturing methamphetamine, § 5-64-423(a) or the former § 5-64-401, and is sentenced to death or a term of imprisonment, the court shall not release the defendant on bail or otherwise pending appeal or for any reason.

(c)(1) If the appeal is granted by the circuit court, the appeal bond shall be conditioned that the defendant surrender himself or herself in the Supreme Court upon the dismissal of the appeal or upon the rendition of final judgment upon the appeal.

(2)(A) If the defendant fails to surrender himself or herself in the Supreme Court in compliance with the conditions of his or her bond, the Supreme Court shall direct that fact to be entered on its records and shall adjudge the bail bond of the defendant, or the money deposited in lieu thereof, to be forfeited.

(B) The Clerk of the Supreme Court shall immediately make and forward to the clerk of the circuit court of the county in which the defendant was tried a certified copy of the judgment of the Supreme Court.

(3) The circuit clerk shall file the copy and shall immediately issue a summons against the sureties on the bail bond requiring them to appear and show cause why judgment should not be rendered against them for the sum specified in the bail bond on account of the forfeiture thereof, which summons shall be made returnable and shall be executed as in civil actions, and the action shall be docketed and shall proceed as an ordinary civil action.

(4) The summons may be served in any county in the state, and the service of the summons on the defendant or defendants in any county in the state shall give the court complete jurisdiction of the defendant and the cause.

(5) No pleadings on the part of the state shall be required in such cases.

(d)(1) If the court in which the case is tried refuses to grant an appeal and the appeal shall thereafter be granted by any Justice or Justices of the Supreme Court, the bond shall be conditioned that, upon the dismissal of the appeal or the rendition of the final judgment therein by the Supreme Court, the defendant shall surrender himself or herself in execution of the judgment.

(2) If the appeal is not granted by the court in which the defendant was convicted, the bail bond shall also be conditioned that, if the appeal

is not granted by any Justice or Justices of the Supreme Court, the defendant shall, immediately upon the denial of an appeal, surrender himself or herself to the sheriff of the county in which he or she was convicted in execution of the judgment and sentence of the trial court.

History. Acts 1899, No. 158, §§ 3, 4, p. 291; C. & M. Dig., §§ 2959, 2960, 3398-3402; Acts 1927, No. 6, § 1; Pope's Dig., §§ 3775, 3776, 4241 — 4245; A.S.A. 1947, §§ 43-2715 — 43-2719; Acts 1987, No. 31, § 1; 1994 (1st Ex. Sess.), No. 3, § 1; 1997, No. 1135, § 1; 2011, No. 570, § 83.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment substituted "manufacturing methamphetamine, § 5-64-423(a) or the former § 5-64-401" for "or manufacturing methamphetamine in violation of § 5-64-401" in (b)(3).

16-91-113. Matters to be considered — Preserving error — Action to be taken.

CASE NOTES

Relation to Federal Habeas Proceedings.

Fact that the Arkansas Supreme Court was required, pursuant to Ark. Sup. Ct. & Ct. App. R. 4-3(h) and subsection (a) of this section, to review the entire record of defendant's criminal case for prejudicial error, after she was convicted of capital murder, did not undermine the district court's finding that she was precluded for obtaining federal habeas relief under 28 U.S.C.S. § 2254 with regard to claims that she had not raised in the state courts because those claims were procedurally defaulted: (1) the state Supreme Court's review obligation under Ark. Sup. Ct. & Ct. App. R. 4-3(h) was limited to issues that defendant actually raised in the trial or appellate courts; (2) the state Supreme Court could not be deemed to have reviewed the procedurally defaulted claims under App. R. 4-3(h) because defendant had not raised any of them in the state trial court or in her appellate briefs; and (3) the district court's procedural default holding was consistent with current U.S. Supreme Court precedent, which required the defendant to "fairly present" her federal claims to the state courts first, which required that she actually raise the claims in the state courts. Meadows v. Norris, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 85428 (E.D. Ark. Nov. 9, 2007).

Cited: Lacy v. State, 2010 Ark. 388, — S.W.3d — (2010).

Subchapter 2 — Post-Conviction

16-91-204. Legislative intent.

CASE NOTES

Denial of Investigator

Circuit court did not abuse its discretion in denying the inmate authorization to retain an investigator to probe into issues of jury bias and misconduct because the inmate failed to demonstrate the need for an investigator, as nothing required the inmate's counsel to rely exclusively on an investigator to investigate whether one of the jurors had failed to disclose information accurately during voir dire and the inmate admitted that he did not know if any misrepresentation occurred. Williams v. State, 369 Ark. 104, 251 S.W.3d 290 (2007).

Cited: Lee v. State, 367 Ark. 84, 238 S.W.3d 52 (2006).

CHAPTER 92

COSTS, FEES, FINES, ETC.

SECTION.

16-92-118. Fines — Collection and deposit.

(a)(1) Notwithstanding § 16-13-709, the quorum court of each county of this state may delegate the responsibility for the electronic collection of fines assessed in a circuit court of this state within that county to the Administrative Office of the Courts or the Information Network of Arkansas.

(2) Fines collected in each circuit court by the Administrative Office of the Courts or the Information Network of Arkansas shall be remitted by the fifth working day of the following month to the county official, agency, or department designated under § 16-13-709 as primarily responsible for the collection of fines assessed in that circuit court to be disbursed to the appropriate county fund, state entity, or state agency as provided by law.

(b)(1) Notwithstanding § 16-13-709, the governing body or, if applicable and by mutual agreement, each governing body of a political subdivision that contributes to the expenses of a district court or the governing body of the city in which a city court is located may designate the responsibility for the electronic collection of fines assessed in that district court or that city court to the Administrative Office of the Courts or the Information Network of Arkansas.

(2) Fines collected in each district court or each department of district court by the Administrative Office of the Courts or the Information Network of Arkansas shall be remitted by the fifth working day of the following month to the county or city official, agency, or department designated under § 16-13-709 as primarily responsible for the collection of fines assessed in that district court to be disbursed under § 16-17-707.

(c) Fines collected in each city court by the Administrative Office of the Courts or the Information Network of Arkansas shall be disbursed by the fifth working day of the following month to the city official, agency, or department designated under § 16-13-709 as primarily responsible for the collection of fines assessed in that city court to be disbursed to the general fund or other city fund, state agency, or state entity as provided by law.

(d)(1) The Administrative Office of the Courts or the Information Network of Arkansas shall be allowed to charge a transaction fee for any electronic payment of a court-ordered fine by an approved credit card or debit card.

(2) The fee provided for in subsection (d)(1) of this section collected by the Administrative Office of the Courts shall be deposited by the fifth day of each month into the Judicial Fine Collection Enhancement Fund established by § 16-13-712.

(e)(1) This section does not prohibit the county or city official, agency, or department designated under § 16-13-709 as primarily responsible for the collection of fines assessed in a circuit court, district court, or city court of this state from the electronic collection of fines. The quorum court of each county may establish a transaction fee to be charged by the county official, agency, or department designated under § 16-13-709 as primarily responsible for the collection of fines assessed in a circuit court within that county for any electronic payment of a court-ordered fine by an approved credit card or debit card.

(2) The governing body or, if applicable and by mutual agreement, each governing body of a political subdivision that contributes to the expenses of a district court or the governing body of the city in which a city court is located, may establish a transaction fee to be charged by the city or county official, agency, or department designated under § 16-13-709 as primarily responsible for the collection of fines assessed in that district court or city court for any electronic payment of a court-ordered fine by an approved credit card or debit card.

(3) The fee provided for in subdivisions (e)(1) and (2) of this section collected by the designated county or city official, agency, or department shall be deposited by the tenth day of each month in the appropriate circuit court automation fund, district court automation fund, or city court automation fund established under § 16-13-704 to be used solely for the purposes stated in that section.

(f)(1) The procedures established by this section apply to the assessment and collection of all monetary fines, however designated, imposed by circuit courts, district courts, or city courts for criminal convictions, traffic convictions, civil violations, and juvenile delinquency adjudications and shall be used to obtain prompt and full payment of all such fines.

(2) For purposes of this section, the term "fine" or "fines" means all monetary penalties imposed by the courts of this state, which include fines, court costs, restitution, probation fees, and public service work supervisory fees.

History. Acts 2009, No. 328, § 4; 2011, No. 1218, § 13.

A.C.R.C. Notes. Acts 2009, No. 328, §§ 1, 2, provided: "SECTION 1. Pursuant to Arkansas Code § 16-10-101 and 16-10-102, the Arkansas Supreme Court, through the Administrative Office of the Courts, is responsible for the design, purchase, implementation, and operation of a comprehensive automated court management system for use by all district, circuit, and appellate courts in the State of Arkansas.

"In 2001, the Arkansas Supreme Court created the Arkansas Court Automation Project to carry out these responsibilities and appointed the Arkansas Supreme Court Committee on Automation to oversee the project. Since that time a comprehensive system has been bid and purchased, redesigned for maximum use in Arkansas courts, and implemented in a number of pilot courts in the state. The system is now completed and scheduled

for distribution and use by all of the courts in the state.

"The purpose of this Act is to provide a structure for the perpetual staffing and operation of the system so that the system is self-supporting and all funding is generated by and through use of the system and without any use of the general revenue funds of the State of Arkansas."

"SECTION 2. This Act is to be known as the 'Court Technology Improvement Act of 2009.' "

Amendments. The 2011 amendment substituted "a transaction fee" for "an access fee not to exceed ten dollars ($10.00" in (d)(1), (e)(1), and (e)(2); redesignated (e)(3) and (e)(4) as (e)(2) and (e)(3); and substituted "subdivisions (e)(1) and (2)" for "subdivisions (e)(2) and (3)" in (e)(3).

CHAPTER 93

PROBATION AND PAROLE

SUBCHAPTER.

Subchapter 1 — General Provisions

SECTION.

16-93-101. Definitions.

As used in this act:

(1) "Case plan" means an individualized accountability and behavior change strategy for supervised individuals that:

(A) Targets and prioritizes the specific criminal risk factors of the offender based upon his or her assessment results;

(B) Matches the type and intensity of supervision and treatment conditions to the offender's level of risk, criminal risk factors, and individual characteristics, such as gender, culture, motivational stage, developmental stage, and learning style;

(C) Establishes a timetable for achieving specific behavioral goals, including a schedule for payment of victim restitution, child support, and other financial obligations; and

(D) Specifies positive and negative actions that will be taken in response to the supervised individual's behaviors;

(2) "Criminal risk factors" are characteristics and behaviors that affect a person's risk for committing crimes and may include without limitation the following risk and criminogenic need factors:

(A) Antisocial personality;

(B) Criminal thinking;

(C) Criminal associates;

(D) Dysfunctional family;

(E) Low levels of employment or education; and

(F) Substance abuse;

(3) "Evidence-based practices" means policies, procedures, programs, and practices proven by scientific research to reliably produce reductions in recidivism;

(4) "Intermediate sanctions" means a nonprison accountability measure imposed on an offender in response to a violation of supervision conditions. Such measures may include without limitation:

(A) The use of electronic supervision tools;

(B) Drug and alcohol testing or monitoring;

(C) Day or evening reporting;

(D) Restitution;

(E) Forfeiture of earned discharge credits;

(F) Rehabilitative interventions such as substance abuse and mental health treatment;

(G) Reporting requirements to probation or parole officers;

(H) Community service or community work project;

(I) Secure or unsecure residential treatment facilities; and

(J) Short-term, intermittent incarceration;

(5) "Jacket review" means the review of the file of a transfer-eligible inmate located at any correctional facility in the state by an individual staff member or team of staff members of the Department of Community Correction for purposes of preparing the inmate's application for parole consideration by the Parole Board;

(6) "Parole" means the release of the prisoner into the community by the board prior to the expiration of his or her term, subject to conditions imposed by the board and to the supervision of the Department of Community Correction. When a court or other authority has filed a warrant against the prisoner, the board may release him or her on parole to answer the warrant of the court or authority;

(7) "Probation" means a procedure under which a defendant, found guilty upon verdict or plea, is released by the court without imprisonment, subject to conditions imposed by the court and subject to the supervision of the Department of Community Correction, but only if the supervision is requested in writing by the court;

(8) "Recidivism" means the return to incarceration in a Department of Correction or Department of Community Correction community correctional facility other than a technical violator program within a three-year period;

(9) "Risk needs assessment review" means an examination of the results of a validated risk-needs assessment;

(10)(A) "Treatment" means targeted interventions that focus on criminal risk factors in order to reduce the likelihood of criminal behavior.

(B) Treatment options may include without limitation:

(i) Community-based programs that are consistent with evidence-based practices;

(ii) Cognitive behavioral programs;

(iii) Inpatient and outpatient substance abuse and mental health programs; and

(iv) Other available prevention and intervention programs that have been scientifically proven to reliably reduce recidivism; and

(11) "Validated risk-needs assessment" means a determination of a person's risk to reoffend and the needs that, when addressed, reduce the risk to reoffend through the use of an actuarial assessment tool that assesses the dynamic and static factors that drive criminal behavior.

History. Acts 1968 (1st Ex. Sess.), No. 50, § 23; A.S.A. 1947, § 43-2801; Acts 2005, No. 1994, § 286; 2011, No. 570, § 84.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment added (1) through (5); redesignated former (1) and (2) as (6) and (7); and added (8) through (11).

16-93-104. Supervision fee — Direct payment by offender — Failure to pay.

(a)(1) Any offender on probation, parole, or transfer under supervision of the Department of Community Correction shall pay to the department a monthly fee of thirty-five dollars ($35.00).

(2) The Director of the Department of Community Correction or his or her designee shall deposit:

(A) Twenty-five dollars ($25.00) of each payment received into the State Treasury as special revenues credited to the Community Correction Revolving Fund; and

(B)(i) Ten dollars ($10.00) of each payment received into the Best Practices Fund, § 19-5-1139, to ensure evidence-based programs and supervision practices are available to offenders supervised on either probation or parole.

(ii) The Board of Corrections shall promulgate regulations for the accounting and distribution of the Best Practices Fund to ensure that:

(a) No less than seventy-five percent (75%) of the funds are used by the Department of Community Correction for direct services to the offender population it supervises that have been proven, through research, to reduce recidivism among the offender population served;

(b) The direct services may be provided by the Department of Community Correction, the Department of Human Services, and community-based vendors meeting these criteria and serving offend-

ers being supervised by the Department of Community Correction; and

(c) No more than ten percent (10%) of the funds are used to train staff managing the offender population in evidence-based practices.

(3) Expenditures from the Community Correction Revolving Fund shall be used for continuation and expansion of community punishment programs as established and approved by the Board of Corrections.

(b)(1) When an offender on probation defaults in the payment of supervision fees or any installment thereof, the court may require the offender to show cause why he or she would not be imprisoned for nonpayment.

(2) The offender shall not be imprisoned if the offender is financially unable to make the payments and states so to the court in writing, under oath, and the court so finds.

(3) Unless the offender shows that his or her default was not attributable to a purposeful refusal to obey the sentence of the court or to a failure on his or her part to make a good faith effort to obtain the funds required for payment, the court may order the defendant imprisoned until the payments are made.

(4) If the court determines that the default in payment is not attributable to the causes specified in subdivision (b)(3) of this section, the court may enter an order allowing the offender additional time for payment, reducing the amount of each installment, or revoking the fees or the unpaid portion thereof in whole or in part.

(c)(1) The offender on parole may be imprisoned for violation of parole if the offender is financially able to make the payments and if the payments are not made and the Parole Board so finds, subject to the limitations set out in this subsection.

(2) The offender shall not be imprisoned if the offender is financially unable to make the payments and states so under oath to the Parole Board in writing, and the Parole Board so finds.

History. Acts 1981, No. 70, §§ 1, 2; 1983, No. 887, §§ 1, 2; A.S.A. 1947, §§ 43-2808.1, 43-2808.2; Acts 1997, No. 278, § 1; 2011, No. 570, § 85.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment, in (a)(1), substituted "parole, or transfer" for "or parole," inserted "monthly," and substituted "of thirty-five dollars ($35.00)" for "as determined by the Board of Corrections"; subdivided (a)(2); substituted "Twenty-five dollars ($25.00) of each payment" for "the payments" in (a)(2)(A); inserted (a)(2)(B); and substituted "Community Correction Revolving Fund" for "fund" in (a)(3).

Subchapter 2 — Parole Board

Effective Dates. Acts 2007, No. 697, § 7: July 1, 2007. Emergency clause provided: "It is found and determined by the General Assembly, that the Constitution of the State of Arkansas prohibits the appropriation of funds for more than a two (2) year period; that the effectiveness of this Act on July 1, 2007 is essential to the operation of the agency for which the appropriations in this Act are provided, and that in the event of an extension of the Regular Session, the delay in the effective date of this Act beyond July 1, 2007 could work irreparable harm upon the proper administration and provision of essential governmental programs. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 2007."

16-93-201. Creation — Members — Qualifications and training.

(a)(1) There is created the Parole Board, to be composed of seven (7) members to be appointed from the state at large by the Governor and confirmed by the Senate.

(2) Seven (7) members shall be full-time officials of this state, one (1) of whom shall be designated by the Governor as the chair of the board.

(3) Each member shall serve a seven-year term, except that the terms shall be staggered by the Governor so that the term of one (1) member expires each year.

(4)(A) A member must have at least a bachelor's degree from an accredited college or university, and the member should have no less than five (5) years' professional experience in one (1) of the following fields:

(i) Parole supervision;
(ii) Probation supervision;
(iii) Corrections;
(iv) Criminal justice;
(v) Law;
(vi) Law enforcement;
(vii) Psychology;
(viii) Psychiatry;
(ix) Sociology;
(x) Social work; or
(xi) Other related field.

(B) If the member does not have at least a bachelor's degree from an accredited college or university, he or she must have no less than seven (7) years' experience in a field listed in subdivision (a)(4)(A) of this section.

(5)(A) A member appointed after July 1, 2011, whether or not he or she has served on the board previously, shall complete a comprehensive training course developed in compliance with guidelines from the National Institute of Corrections, the Association of Paroling Authorities International, or the American Probation and Parole Association.

(B) All members shall complete annual training developed in compliance with guidelines from the National Institute of Corrections, the Association of Paroling Authorities International, or the American Probation and Parole Association.

(C) Training components shall include an emphasis on the following subjects:

(i) Data-driven decision making;

(ii)*(a)* Evidence-based practice.

(b) As used in this section, "evidence-based practice" means practices proven through research to reduce recidivism;

(iii) Stakeholder collaboration; and

(iv) Recidivism reduction.

(b) If any vacancy occurs on the board prior to the expiration of a term, the Governor shall fill the vacancy for the remainder of the unexpired term, subject to confirmation by the Senate at its next regular session.

(c) The members of the board may receive expense reimbursement and stipends in accordance with § 25-16-901 et seq.

(d) Four (4) members of the board shall constitute a quorum.

History. Acts 1989, No. 937, §§ 2, 3, 5; 1993, No. 530, § 1; 1993, No. 547, § 1; 1995, No. 285, § 1; 1995, No. 381, § 1; 1997, No. 250, § 120; 1999, No. 979, § 1; 2005, No. 1033, § 1; 2007, No. 697, § 3; 2011, No. 570, § 86.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2007 amendment substituted "Seven (7)" for "Six (6)" in (a)(2).

The 2011 amendment added "Qualifications and training" in the section heading; and inserted (a)(4) and (a)(5).

16-93-206. Parole revocation review — Jurisdiction.

(a) The Parole Board shall serve as the revocation review board for any person subject to either parole or transfer from prison.

(b) Revocation proceedings for either parole or transfer shall follow all legal requirements applicable to parole and shall be subject to any additional policies, rules, and regulations set by the board.

History. Acts 1993, No. 530, § 2; 1993, No. 547, § 2; 1994 (1st Ex. Sess.), No. 8, § 1; 1994 (1st Ex. Sess.), No. 9, § 1; 1999, No. 1035, § 1; 2003, No. 1390, § 9; 2007, No. 600, § 1; 2007, No. 866, § 1; 2011, No. 570, § 87.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2007 amendment by No. 600 added (c)(1)(B) and redesignated the remaining subsections accordingly.

The 2007 amendment by No. 866 added (c)(2)(C).

The 2011 amendment substituted "Parole revocation review — Jurisdiction" for "Board procedures" in the section heading; deleted (a) through (f); redesignated (g)(1) as (a) and (g)(2) as (b); and deleted (h).

16-93-207. Applications for pardon, commutation of sentence, and remission of fines and forfeitures.

(a)(1)(A) At least thirty (30) days before granting an application for pardon, commutation of sentence, or remission of fine or forfeiture, the Governor shall file with the Secretary of State a notice of his or her intention to grant the application.

(B) The Governor shall also direct the Department of Correction to send notice of his or her intention to the judge, the prosecuting attorney, and the sheriff of the county in which the applicant was convicted and, if applicable, to the victim or the victim's next of kin.

(2) The filing of the notice shall not preclude the Governor from later denying the application, but any pardon, commutation of sentence, or remission of fine or forfeiture granted without filing the notice shall be null and void.

(b) If the Governor does not grant an application for pardon, commutation of sentence, or remission of fine or forfeiture within two hundred forty (240) days of the Governor's receipt of the recommendation of the Parole Board regarding the application, the application shall be deemed denied by the Governor, and any pardon, commutation of sentence, or remission of fine or forfeiture granted after the two-hundred-forty-day period shall be null and void.

(c)(1)(A) Except as provided in subdivision (c)(3) and subsection (d) of this section, if an application for pardon, commutation of sentence, or remission of fine or forfeiture is denied in writing by the Governor, the person filing the application shall not be eligible to file a new application for pardon, commutation of sentence, or remission of fine or forfeiture related to the same offense for a period of four (4) years from the date of filing the application that was denied.

(B) Any person who made an application for pardon, commutation of sentence, or remission of fine or forfeiture that was denied on or after July 1, 2004, shall be eligible to file a new application four (4) years after the date of filing the application that was denied.

(2) If an application for pardon, commutation of sentence, or remission of fine or forfeiture is denied by the Governor pursuant to subsection (b) of this section, the person filing the application may immediately file a new application for pardon, commutation of sentence, or remission of fine or forfeiture related to the same offense.

(3)(A) The Parole Board may waive the waiting period for filing a new application for pardon, commutation of sentence, or remission of fine or forfeiture described in subdivision (c)(1)(A) of this section if:

(i) It has been at least twelve (12) months after the date of filing the application that was denied; and

(ii) The Parole Board determines that the person whose application was denied has established that:

(a) New material evidence relating to the person's guilt or punishment has been discovered;

(b) The person's physical or mental health has substantially deteriorated; or

(c) Other meritorious circumstances justify a waiver of the waiting period.

(B)(i) The Board of Corrections shall promulgate rules that will establish policies and procedures for waiver of the waiting period.

(ii) The Board of Corrections may make additions, amendments, changes, or alterations to the rules in accordance with the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(d)(1) Except as provided in subdivision (d)(3) of this section, if an application for pardon, commutation of sentence, or remission of fine or forfeiture of a person sentenced to life imprisonment without parole is denied in writing by the Governor, the person filing the application shall not be eligible to file a new application for pardon, commutation of sentence, or remission of fine or forfeiture related to the same offense for a period of:

(A) Six (6) years from the date of the denial; or

(B) Eight (8) years from the date of the denial if the applicant is serving a sentence of life without parole for capital murder, § 5-10-101.

(2) If an application for pardon, commutation of sentence, or remission of fine or forfeiture of a person sentenced to life imprisonment without parole is denied by the Governor pursuant to subsection (b) of this section, the person filing the application may immediately file a new application for pardon, commutation of sentence, or remission of fine or forfeiture related to the same offense.

(3)(A) The Parole Board or the Governor may waive the waiting period for filing a new application for pardon, commutation of sentence, or remission of fine or forfeiture described in subdivision (d)(1) of this section if:

(i) It has been at least twelve (12) months after the date of filing the application that was denied; and

(ii) The Parole Board determines that the person whose application was denied has established that:

(a) New material evidence relating to the person's guilt or punishment has been discovered;

(b) The person's physical or mental health has substantially deteriorated; or

(c) Other meritorious circumstances justify a waiver of the waiting period.

(B)(i) The Board of Corrections shall promulgate rules that will establish policies and procedures for waiver of the waiting period.

(ii) The Board of Corrections may make additions, amendments, changes, or alterations to the rules in accordance with the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(e) If an application for pardon, commutation of sentence, or remission of fine is granted, the Governor shall:

(1) Include in his or her written order the reasons for granting the application; and

(2) File with the Senate and the House of Representatives a copy of the order that includes:

(A) The applicant's name;

(B) The offense of which the applicant was convicted;

(C) The sentence imposed upon the applicant;

(D) The date that the sentence was imposed; and

(E) The effective date of the pardon, commutation of sentence, or remission of fine.

(f)(1) This section shall not apply to reprieves.

(2) Reprieves may be granted as presently provided by law.

History. Acts 1993, No. 5, §§ 1-4; 1995, No. 1195, § 1; 1999, No. 498, § 2; 2005, No. 1975, §§ 4, 5; 2005, No. 2097, § 2; 2007, No. 183, § 1; 2011, No. 1169, § 1.

Amendments. The 2007 amendment deleted (a)(1)(B)(ii) and redesignated (a)(1)(B)(i) as (a)(1)(B); inserted "and subsection (d)" in (c)(1)(A); added (d); and redesignated the following subdivisions accordingly.

The 2011 amendment inserted the (d)(1)(A) designation and (d)(1)(B).

16-93-208. Services and equipment.

A.C.R.C. Notes. Acts 2010, No. 165, § 3, provided: "ASSISTANCE PROVISION. The Department of Correction and the Department of Community Correction may provide services, furnishings, equipment and office space to assist the Parole Board in fulfilling the purposes for which the Board was created by law.

"The provisions of this section shall be in effect only from July 1, 2010 through June 30, 2011."

Acts 2011, No. 920, § 3, provided: "ASSISTANCE PROVISION. The Department of Correction and the Department of Community Correction may provide services, furnishings, equipment and office space to assist the Parole Board in fulfilling the purposes for which the Board was created by law.

"The provisions of this section shall be in effect only from July 1, 2011 through June 30, 2012."

16-93-210. Monthly performance report on parole applications and outcome.

(a)(1) Beginning October 1, 2011, the Parole Board shall submit a monthly report to the Chairpersons of the House and Senate Judiciary Committees, the Legislative Council, the Board of Corrections, the Governor, and the Commission on Disparity in Sentencing showing the number of persons who make application for parole and those who are granted or denied parole during the previous month for each criminal offense classification.

(2) The report shall include a breakdown by race of all persons sentenced in each criminal offense classification.

(3) The report shall include the reason for each denial of parole, the results of the risk-needs assessment, and the course of action that accompanies each denial pursuant to § 16-93-615(a)(2)(B)(ii).

(b) The board shall cooperate with and upon request make presentations and provide various reports, to the extent the board's budget

will allow, to the Legislative Council concerning board policy and criteria on discretionary offender programs and services.

History. Acts 2003, No. 1031, § 6; 2005, No. 1994, § 277; 2011, No. 570, § 88.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment substituted "Monthly performance report" for "Annual report" in the section heading; in (a)(1), substituted "October 1, 2011" for "July 31, 2003, and on July 31 of each year thereafter," substituted "a monthly report" for "an annual report," inserted "the Chairpersons of the House and Senate Judiciary Committees," inserted "the Board of Corrections, the Governor," and substituted "previous month" for "fiscal year"; and added (a)(3).

16-93-211. Early release to transitional housing facilities.

(a)(1) As used in this section, "transitional housing" means a program that provides housing for one (1) or more offenders who have been either:

(A) Transferred or paroled from the Department of Correction by the Parole Board; or

(B) Placed on probation by a circuit court or district court.

(2) An offender's home or the residence of an offender's family member shall not be considered a transitional housing facility for purposes of this section.

(b)(1) To assist an offender who will be eligible for parole or transfer to successfully reintegrate into the community, the board is authorized to place the offender into approved transitional housing up to one (1) year prior to the offender's date of eligibility for parole or transfer.

(2) Subject to conditions of release and consistent with rules promulgated by the board, placement in a transitional housing facility must be preceded by:

(A) The provision of all applicable notices under § 16-93-615; and

(B) A hearing conducted by the board.

(c) The decision to place an offender in transitional housing and the establishment of conditions of release by the board must be based on a reasoned, rational plan developed in conjunction with an accepted risk-needs assessment tool such that each placement decision is based on;

(1) Established criteria; and

(2) A determination that there is a reasonable probability that an offender can be placed in a transitional housing facility without detriment to:

(A) The community; or

(B) The offender.

(d) Conditions of release imposed by the board must at a minimum include a curfew requiring an offender placed in transitional housing to present himself or herself at a scheduled time to be confined in the transitional housing facility.

(e) An offender placed in transitional housing by the board will be supervised by officers of the Department of Community Correction.

(f) An offender who without permission leaves the custody of the transitional housing facility in which he or she is placed may be subject to criminal prosecution for escape, §§ 5-54-110 — 5-54-112.

(g) Revocation of placement in transitional housing must follow the revocation proceedings established in § 16-93-705.

History. Acts 2005, No. 679, § 1; 2011, No. 570, § 89.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment substituted "§ 16-93-615" for "§ 16-93-206" in (b)(2)(A).

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2005 Arkansas General Assembly, Practice, Procedure, and Courts, 28 U. Ark. Little Rock L. Rev. 377.

Subchapter 3 — Probation and Suspended Imposition of Sentence

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A.C.R.C. Notes.
Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

16-93-301. Definitions.

As used in this subchapter, "expungement" means the procedure and effect as defined in § 16-90-901(a).

History. Acts 1975, No. 346, § 1; A.S.A. 1947, § 43-1231; Acts 1995, No. 998, § 8; 2011, No. 570, § 90.

Amendments. The 2011 amendment rewrote the section.

16-93-302. Probation — First time offenders — Penalties.

(a)(1) A person may not avail himself or herself of the provisions of this section and §§ 16-93-301 and 16-93-303 on more than one (1) occasion.

(2) Any person seeking to avail himself or herself of the benefits of this section and §§ 16-93-301 and 16-93-303 who falsely testifies, swears, or affirms to the court that he or she has not previously availed himself or herself of the benefits of this section and §§ 16-93-301 and 16-93-303 is guilty of a Class D felony.

(b)(1) Any person charged under this section and §§ 16-93-301 and 16-93-303 with keeping the confidential records of first offenders, as provided in § 16-93-301, who divulges any information contained in the records to any person or agency other than a law enforcement officer or judicial officer is guilty of a violation and upon conviction is subject to a fine of not more than five hundred dollars ($500).

(2) Each violation shall be considered a separate offense.

History. Acts 1975, No. 346, §§ 4, 5; A.S.A. 1947, §§ 43-1234, 43-1235; Acts 2005, No. 1994, § 432; 2011, No. 570, § 90.

Amendments. The 2011 amendment added "Probation — First time offenders" in the section heading; substituted "A person may not" for "No person may" in (a)(1); and deleted "the provisions of" following "Any person charged under" in (b)(1).

CASE NOTES

Eligibility.

Although defendant had previously reaped the benefits of New Mexico's first-offender statute, under the plain language of this section and § 16-93-303, defendant had never before availed himself of Arkansas' benefits, nor had he been previously convicted of a felony; thus, defendant's first-offender status should not have been voided. Montoya v. State, 2010 Ark. 419, — S.W.3d — (2010).

16-93-303. Probation — First time offenders — Procedure.

(a)(1)(A)(i) Whenever an accused enters a plea of guilty or nolo contendere prior to an adjudication of guilt, the judge of the circuit court or district court, in the case of a defendant who previously has not been convicted of a felony, without making a finding of guilt or entering a judgment of guilt and with the consent of the defendant, may defer further proceedings and place the defendant on probation for a period of not less than one (1) year, under such terms and conditions as may be set by the court.

(ii) A sentence of a fine not exceeding three thousand five hundred dollars ($3,500) or an assessment of court costs against a defendant does not negate the benefits provided by this section or cause the probation placed on the defendant under this section to constitute a conviction except under subsections (c)-(e) of this section.

(iii) A serious felony involving violence or a felony involving violence as provided in § 5-4-501 shall not be eligible for expungement of record under this subchapter.

(B) However, no person who is found guilty of or pleads guilty or nolo contendere to a sexual offense as defined by § 5-14-101 et seq. and §§ 5-26-202, 5-27-602, 5-27-603, and 5-27-605 in which the victim was under eighteen (18) years of age shall be eligible for expungement or sealing of the record under this subchapter.

(2) Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided.

(3) Nothing in this subsection shall require or compel any court of this state to establish first offender procedures as provided in this section and §§ 16-93-301 and 16-93-302, nor shall any defendant be availed the benefit of this section and §§ 16-93-301 and 16-93-302 as a matter of right.

(b) Upon fulfillment of the terms and conditions of probation or upon release by the court prior to the termination period thereof, the defendant shall be discharged without court adjudication of guilt, whereupon the court shall enter an appropriate order that shall effectively dismiss the case, discharge the defendant, and expunge the record, if consistent with the procedures established in § 16-90-901 et seq.

(c) During the period of probation described in subdivision (a)(1)(A)(i) of this section, a defendant is considered as not having a felony conviction except for:

(1) Application of any law prohibiting possession of a firearm by certain persons;

(2) A determination of habitual offender status;

(3) A determination of criminal history;

(4) A determination of criminal history scores;

(5) Sentencing; and

(6) A purpose of impeachment as a witness under Rule 609 of the Arkansas Rules of Evidence.

(d) After successful completion of probation placed on the defendant under this section, a defendant is considered as not having a felony conviction except for:

(1) A determination of habitual offender status;

(2) A determination of criminal history;

(3) A determination of criminal history scores;

(4) Sentencing; and

(5) A purpose of impeachment as a witness under Rule 609 of the Arkansas Rules of Evidence.

(e) The eligibility to possess a firearm of a person whose record has been expunged and sealed under this subchapter and § 16-90-901 et seq. is governed by § 5-73-103.

History. Acts 1975, No. 346, §§ 2, 3; A.S.A. 1947, §§ 43-1232, 43-1233; Acts 1995, No. 998, § 9; 1999, No. 1407, § 1; 2003, No. 1185, § 219; 2003, No. 1753,

§ 2; 2007, No. 744, § 2; 2011, No. 570, § 90; 2011, No. 1233, § 1.

Amendments. The 2007 amendment added (a)(1)(A)(ii) and made related changes; inserted "making a finding of guilt or" in (a)(1)(A)(i); and added (c), (d) and (e).

The 2011 amendment by No. 570 inserted "court" following "judge of the circuit" in (a)(1)(A)(i); and inserted "or sealing" in (a)(1)(B).

The 2011 amendment by No. 1233 inserted (a)(1)(A)(iii).

CASE NOTES

Analysis

Applicability.
Expungement.

Applicability.

Supreme Court reversed defendant's sentence and remanded for new sentencing because she had entered a plea of not guilty and was adjudicated guilty by the court following a bench trial, and therefore she was ineligible for sentencing pursuant to Act 346. State v. Webb, 373 Ark. 65, 281 S.W.3d 273 (2008).

Although defendant had previously reaped the benefits of New Mexico's first-offender statute, under the plain language of § 16-93-302 and this section, defendant had never before availed himself of Arkansas' benefits, nor had he been previously convicted of a felony; thus, defendant's first-offender status should not have been voided. Montoya v. State, 2010 Ark. 419, — S.W.3d — (2010).

Expungement.

Appellate court affirmed the denial of an inmate's motion to vacate because, in reviewing the lengthy colloquy between the court it, was evident that expungement was not part of the individual's plea agreement; moreover, there was no right to expungement under this section. Barnett v. State, 366 Ark. 427, 236 S.W.3d 491 (2006).

Trial court erred in denying defendant's petition to have defendant's criminal record expunged because at the time defendant committed the sexual offenses, this section did not prohibit expungement for sexual offenses where the victim was under 18. Act 1407 of 1999, which precluded expungement in those circumstances, was not effective until July 30, 1999, and the act did not indicate that it was to be retroactively applied. McBride v. State, 99 Ark. App. 201, 258 S.W.3d 782 (2007).

16-93-304. Probation — First-time offenders — Arkansas Crime Information Center.

(a) All district court judges and circuit court judges shall immediately report to the Arkansas Crime Information Center, in the form prescribed by the center, all probations of criminal defendants under §§ 16-93-301 — 16-93-303.

(b) Prior to granting probation to a criminal defendant under §§ 16-93-301 — 16-93-303, the court shall query the center to determine whether the criminal defendant has previously been granted probation under the provisions of §§ 16-93-301 — 16-93-303.

(c) If the center determines that an individual has utilized §§ 16-93-301 — 16-93-303 more than one (1) time, the center shall notify the last sentencing judge of that fact.

History. Acts 1981, No. 581, § 1; A.S.A. 1947, § 43-1236; Acts 2005, No. 1994, § 278; 2011, No. 570, § 90.

Amendments. The 2011 amendment added "Probation — First-time offenders" to the section heading; and inserted "(1)" in (c).

16-93-305. Probation — First time offenders — Sex offender may not reside with minor victim.

(a) Whenever an accused who enters a plea of guilty or nolo contendere prior to an adjudication of guilt for any sexual offense defined in § 5-14-101 et seq. or incest as defined in § 5-26-202 for a sexual offense or incest perpetrated against a minor is eligible for probation under procedures defined in § 16-93-303 or any other provision of law, as a condition of granting probation the court shall prohibit the accused, upon release, from residing in a residence with any minor unless the court makes a specific finding that the accused poses no danger to the minors residing in the residence.

(b) Upon violation of this condition of probation, the court may enter an adjudication of guilt and proceed as otherwise provided by law.

History. Acts 1997, No. 1188, § 1; 2011, No. 570, § 90.

Amendments. The 2011 amendment added "Probation — First time offenders —" to the section heading.

16-93-306. Probation generally — Supervision.

(a)(1) The Director of the Department of Community Correction with the advice of the Board of Corrections shall establish written policies and procedures governing the supervision of probationers designed to enhance public safety and to assist the probationers in integrating into society.

(2)(A) The supervision of probationers shall be based on evidence-based practices including a validated risk-needs assessment.

(B) Decisions shall target the probationer's criminal risk factors with appropriate supervision and treatment.

(b) A probation officer shall:

(1) Investigate all cases referred to him or her by the director, the sentencing judge, or the prosecuting attorney;

(2) Furnish to each probationer under his or her supervision a written statement of the conditions of probation and instruct the probationer that he or she must stay in compliance with the conditions of probation or risk revocation under § 16-93-308;

(3) Develop a case plan for each individual who is assessed as a moderate to high risk to reoffend based on the risk and needs assessment that targets the criminal risk factors identified in the assessment, is responsive to individual characteristics, and provides supervision of offenders according to that case plan;

(4) Stay informed of the probationer's conduct and condition through visitation, required reporting, or other methods, and report to the sentencing court of that information upon request;

(5) Use practicable and suitable methods that are consistent with evidence-based practices to aid and encourage a probationer to improve his or her conduct and condition and to reduce the risk of recidivism;

(6)(A) Conduct a validated risk-needs assessment of the probationer including, without limitation criminal risk factors and specific individual needs.

(B) The actuarial assessment shall include an initial screening and, if necessary, a comprehensive assessment;

(7) The results of the risk-needs assessment shall assist in making decisions that are consistent with evidence-based practices on the type of supervision and services necessary to each parolee; and

(8) Receive annual training on evidence-based practices and criminal risk factors, as well as instruction on how to target these factors to reduce recidivism.

(c)(1) The department shall allocate resources, including the assignment of probation officers, to focus on moderate-risk and high-risk offenders as determined by the actuarial assessment provided in subdivision (b)(5) of this section.

(2) The department shall require public and private treatment and service providers that receive state funds for the treatment of or service for probationers to use evidence-based programs and practices.

(d)(1) The department shall have the authority to sanction probationers administratively without utilizing the revocation process under § 16-93-307.

(2)(A) The department shall develop an intermediate sanctions procedure and grid to guide a probation officer in determining the appropriate response to a violation of conditions of supervision.

(B) Intermediate sanctions administered by the department are required to conform to the sanctioning grid.

(3) Intermediate sanctions shall include without limitation:

(A) Day reporting;

(B) Community service;

(C) Increased substance abuse screening and or treatment;

(D) Increased monitoring, including electronic monitoring and home confinement;

(E)(i) Incarceration in a county jail for no more than seven (7) days.

(ii) Incarceration as an intermediate sanction shall not be used more than ten (10) times with an individual probationer, and no probationer shall accumulate more than thirty (30) days' incarceration as an intermediate sanction before the probation officer recommends a violation of the person's probation under § 16-93-307.

History. Acts 2011, No. 570, § 90.

16-93-307. Probation generally — Revocation hearings.

(a)(1) A defendant arrested for violation of suspension or probation is entitled to a preliminary hearing to determine whether there is reasonable cause to believe that he or she has violated a condition of suspension or probation.

(2) The preliminary hearing shall be conducted by a court having original jurisdiction to try a criminal matter as soon as practicable after arrest and reasonably near the place of the alleged violation or arrest.

(3) The defendant shall be given prior notice of the:

(A) Time and place of the preliminary hearing;

(B) Purpose of the preliminary hearing; and

(C) Condition of suspension or probation the defendant is alleged to have violated.

(4) Except as provided in subsection (c) of this section, the defendant has the right to hear and controvert evidence against him or her and to offer evidence in his or her own behalf.

(5)(A) If the court conducting the preliminary hearing finds that there is reasonable cause to believe that the defendant has violated a condition of suspension or probation, it may order the defendant to be detained or it may return the defendant to supervision and may consider imposing one or more intermediate sanctions in the sanctioning grid pending further revocation proceedings before the court that originally suspended imposition of sentence on the defendant or placed him or her on probation.

(B)(i) If the court conducting the preliminary hearing does not find reasonable cause, it shall order the defendant released from custody.

(ii) However, a release under subdivision (a)(5)(B)(i) of this section does not bar the court that suspended imposition of sentence on the defendant or placed him or her on probation from holding a hearing on the alleged violation of suspension or probation or from ordering that the defendant appear before it.

(6) The court conducting the preliminary hearing shall prepare and furnish to the court that suspended imposition of sentence on the defendant or placed him or her on probation a summary of the preliminary hearing, including the responses of the defendant and the substance of the documents and evidence given in support of revocation.

(b)(1) A suspension or probation shall not be revoked except after a revocation hearing.

(2) The revocation hearing shall be conducted by the court that suspended imposition of sentence on the defendant or placed him or her on probation within a reasonable period of time after the defendant's arrest, not to exceed sixty (60) days.

(3) The defendant shall be given prior written notice of the:

(A) Time and place of the revocation hearing;

(B) Purpose of the revocation hearing; and

(C) Condition of suspension or probation the defendant is alleged to have violated.

(4) Except as provided in subsection (c) of this section, the defendant has the right to:

(A) Hear and controvert evidence against him or her;

(B) Offer evidence in his or her own defense; and

(C) Be represented by counsel.

(5) If suspension or probation is revoked, the court shall prepare and furnish to the defendant a written statement of the evidence relied on and the reasons for revoking suspension or probation.

(c) At a preliminary hearing pursuant to subsection (a) of this section or a revocation hearing pursuant to subsection (b) of this section:

(1) The defendant has the right to counsel and to confront and cross-examine an adverse witness unless the court specifically finds good cause for not allowing confrontation; and

(2) The court may permit the introduction of any relevant evidence of the alleged violation, including a letter, affidavit, and other documentary evidence, regardless of its admissibility under the rules governing the admission of evidence in a criminal trial.

(d) A preliminary hearing pursuant to subsection (a) of this section is not required if:

(1) The defendant waives the preliminary hearing;

(2) The revocation is based on the defendant's commission of an offense for which he or she has been tried and found guilty in an independent criminal proceeding; or

(3) The revocation hearing pursuant to subsection (b) of this section is held promptly after the arrest and in the judicial district where the alleged violation occurred or where the defendant was arrested.

History. Acts 2011, No. 570, § 90.

16-93-308. Probation generally — Revocation.

(a)(1) At any time before the expiration of a period of suspension or probation, a court may summon a defendant to appear before it or may issue a warrant for the defendant's arrest.

(2) The warrant may be executed by any law enforcement officer.

(b) At any time before the expiration of a period of suspension or probation, any law enforcement officer may arrest a defendant without a warrant if the law enforcement officer has reasonable cause to believe that the defendant has failed to comply with a condition of his or her suspension or probation.

(c) A defendant arrested for violation of suspension or probation shall be taken immediately before the court that suspended imposition of sentence or, if the defendant was placed on probation, before the court supervising the probation.

(d) If a court finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his or her suspension or probation, the court may revoke the suspension or probation at any time prior to the expiration of the period of suspension or probation.

(e) A finding of failure to comply with a condition of suspension or probation as provided in subsection (d) of this section may be punished as contempt under § 16-10-108.

(f) A court may revoke a suspension or probation subsequent to the expiration of the period of suspension or probation if before expiration of the period:

(1) The defendant is arrested for violation of suspension or probation;

(2) A warrant is issued for the defendant's arrest for violation of suspension or probation;

(3) A petition to revoke the defendant's suspension or probation has been filed if a warrant is issued for the defendant's arrest within thirty (30) days of the date of filing the petition; or

(4) The defendant has been:

(A) Issued a citation in lieu of arrest under Rule 5 of the Arkansas Rules of Criminal Procedure for violation of suspension or probation; or

(B) Served a summons under Rule 6 of the Arkansas Rules of Criminal Procedure for violation of suspension or probation.

(g)(1)(A) If a court revokes a suspension or probation, the court may enter a judgment of conviction and may impose any sentence on the defendant that might have been imposed originally for the offense of which he or she was found guilty.

(B) However, any sentence to pay a fine or of imprisonment, when combined with any previous fine or imprisonment imposed for the same offense, shall not exceed the limits of § 5-4-201 or § 5-4-401, or if applicable, § 5-4-501.

(2)(A) As used in this subsection, "any sentence" includes the extension of a period of suspension or probation.

(B) If an extension of suspension or probation is made upon revocation, the court is not deprived of the ability to revoke the suspension or probation again should the defendant's conduct again warrant revocation.

(h)(1) A court shall not revoke a suspension of sentence or probation because of a person's inability to achieve a high school diploma, general education development certificate, or gainful employment.

(2)(A) However, the court may revoke a suspension of sentence or probation if the person fails to make a good faith effort to achieve a high school diploma, general education development certificate, or gainful employment.

(B) As used in this section a "good faith effort" means a person:

(i) Has been enrolled in a program of instruction leading to a high school diploma or a general education development certificate and is attending a school or an adult education course; or

(ii) Is registered for employment and enrolled and participating in an employment-training program with the purpose of obtaining gainful employment.

History. Acts 2011, No. 570, § 90.

16-93-309. Probation generally — Revocation hearing — Sentence alternatives.

(a) Following a revocation hearing held under § 16-93-307 and in which a defendant has been found guilty or has entered a plea of guilty or nolo contendere, the court may:

(1) Continue the period of suspension of imposition of sentence or continue the period of probation;

(2) Lengthen the period of suspension or the period of probation within the limits set by § 5-4-306;

(3) Increase the fine within the limits set by § 5-4-201;

(4) Impose a period of confinement to be served during the period of suspension of imposition of sentence or period of probation; or

(5) Impose any conditions that could have been imposed upon conviction of the original offense.

(b) Following a revocation hearing in which a defendant is ordered to continue on a period of suspension or a period of probation, nothing prohibits the court, upon finding the defendant guilty at a subsequent revocation hearing, from:

(1) Revoking the suspension or period of probation; and

(2) Sentencing the defendant to incarceration in the Department of Correction.

(c) If the suspension or probation of a defendant is subsequently revoked and the defendant is sentenced to a term of imprisonment, any period of time actually spent in confinement due to the original revocation shall be credited against the subsequent sentence.

History. Acts 2011, No. 570, § 90.

16-93-310. Probation generally — Revocation — Community correction program.

(a) When a person sentenced under a community correction program, § 5-4-312, violates any terms or conditions of his or her sentence or term of probation, revocation of the sentence or term of probation shall be consistent with the procedures under this subchapter.

(b) Upon revocation, the court of jurisdiction shall determine whether the offender shall remain under the jurisdiction of the court and be assigned to a more restrictive community correction program, facility, or institution for a period of time or committed to the Department of Community Correction.

(c)(1) If committed to the Department of Correction, the court shall specify if the commitment is for judicial transfer of the offender to the Department of Community Correction or is a regular commitment; and

(2)(A) The court shall commit the eligible offender to the custody of the Department of Correction under this subchapter for judicial transfer to the Department of Community Correction subject to the following:

(i) That the sentence imposed provides that the offender shall serve no more than two (2) years of confinement, with credit for

meritorious good time, with initial placement in a Department of Community Correction facility; and

(ii) That the initial placement in the Department of Community Correction is conditioned upon the offender's continuing eligibility for Department of Community Correction placement and the offender's compliance with all applicable rules and regulations established by the Board of Corrections for community correction programs.

(B) Post-prison supervision shall accompany and follow programming when appropriate.

History. Acts 2011, No. 570, § 90.

16-93-311. Probation generally — Restitution.

If the court has suspended imposition of sentence or placed a defendant on probation conditioned upon the defendant's making restitution and the defendant has not satisfactorily made all of his or her payments when the probation period has ended, the court may:

(1) Continue to assert the court's jurisdiction over the recalcitrant defendant; and

(2) Either:

(A) Extend the probation period as the court deems necessary; or

(B) Revoke the defendant's suspended sentence.

History. Acts 2011, No. 570, § 90.

16-93-312. Probation generally — Modification.

(a) During a period of suspension or probation, upon the petition of a probation officer or a defendant or upon the court's own motion, a court may:

(1) Modify a condition imposed on the defendant;

(2) Impose an additional condition authorized by § 5-4-303;

(3) Impose an additional fine authorized by §§ 5-4-201 and 5-4-303; or

(4) Impose a period of confinement authorized by § 5-4-304.

(b) Nothing in this section shall limit the Department of Community Correction from authorizing sanctions within the intermediate sanctions grid when warranted by the defendant's conduct.

History. Acts 2011, No. 570, § 90.

16-93-313. Probation generally — Transfer of jurisdiction.

(a) If a defendant during a period of probation goes from a county where he or she is being supervised to another county, jurisdiction over the defendant may be transferred in the discretion of the supervising court to a court of comparable jurisdiction in the other county if the court in the other county concurs.

(b) If jurisdiction over a defendant is transferred under subsection (a) of this section, the court in the county to which jurisdiction is transferred has any power with respect to the defendant previously possessed by the transferring court.

(c) The procedure under this section may be repeated if a defendant goes from the county where he or she is being supervised to another county during the period of his or her probation.

History. Acts 2011, No. 570, § 90.

16-93-314. Probation generally — Discharge.

(a)(1) The court may discharge the defendant from probation at any time; or

(2) If a judgment of conviction was not entered by the court at the time of suspension or probation and the defendant fully complies with the conditions of suspension or probation for the period of suspension or probation, the court shall discharge the defendant and dismiss any proceedings against him or her.

(b)(1) Subject to the provisions of §§ 5-4-501 — 5-4-504, a person against whom proceedings are discharged or dismissed under subsection (a) of this section may seek to have the criminal record sealed, consistent with the procedures established in § 16-90-901 et seq.

(2) This subsection does not apply if:

(A) The person applying for discharge has been convicted of a sexual offense as defined by § 5-14-101 et seq.; and

(B) The victim was under eighteen (18) years of age.

History. Acts 2011, No. 570, § 90.

Subchapter 4 — Probation — Suspension of Sentence

SECTION.

16-93-402. [Repealed.]

Publisher's Notes. This section, concerning probation officers, was repealed by Acts 2011, No. 570, § 91. The section was derived from Acts 1973, No. 818, § 2; 1975, No. 602, § 1; 1979, No. 326, § 1; A.S.A. 1947, § 43-2332; Acts 1993, No. 549, § 9.

CASE NOTES

Analysis

Applicability.
Revocation of Probation.

Applicability.

This section only applies when a sentence is imposed, in which case, upon revocation, the defendant can only be made to serve the sentence imposed or any lesser sentence which might have originally been imposed. Cox v. State, 365 Ark. 358, 229 S.W.3d 883 (2006).

Revocation of Probation.

After revoking defendant's probation for controlled substance offenses, the trial court did not err in ordering him to serve a 40-year sentence, under § 5-4-309(f)(1)(A), where it could have done originally; this section was inapplicable to the case because no sentence was originally imposed on defendant, he was placed on probation and fined. Cox v. State, 365 Ark. 358, 229 S.W.3d 883 (2006).

Cited: Ward v. State, 2010 Ark. App. 79, — S.W.3d — (2010).

Subchapter 6 — Parole — Eligibility

16-93-605. [Repealed.]

Publisher's Notes. This section, concerning felonies committed on or after April 1, 1983 — purpose and construction of sections, was repealed by Acts 2011, No. 570, § 92. The section was derived from Acts 1983, No. 825, § 5; A.S.A. 1947, § 43-2830.5.

16-93-606. Parole eligibility — Felonies committed on or after April 1, 1983 but before January 1, 1994 — Classification of inmates.

(a) As used in this section, "felony" means a crime classified as Class Y, Class A, or Class B by the laws of this state.

(b) For the purposes of § 16-93-607, inmates shall be classified as follows:

(1) A first offender is an inmate convicted of one (1) or more felonies but who has not been incarcerated in some correctional institution in the United States, whether local, state, or federal, for a crime that was a felony under the laws of the jurisdiction in which the offender was incarcerated, prior to being sentenced to a correctional institution in this state for the offense or offenses for which he or she is being classified;

(2) A second offender is an inmate convicted of two (2) or more felonies and who has been once incarcerated in some correctional institution in the United States, whether local, state, or federal, for a crime that was a felony under the laws of the jurisdiction in which the offender was incarcerated, prior to being sentenced to a correctional institution in this state for the offense or offenses for which he or she is being classified;

(3) A third offender is an inmate convicted of three (3) or more felonies and who has been twice incarcerated in some correctional institution in the United States, whether local, state, or federal, for a crime that was a felony under the laws of the jurisdiction in which the offender was incarcerated, prior to being sentenced to a correctional institution in this state for the offense or offenses for which he or she is being classified; and

(4) A fourth offender is an inmate convicted of four (4) or more felonies and who has been incarcerated in some correctional institution in the United States, whether local, state, or federal, three (3) or more times for a crime that was a felony under the laws of the jurisdiction in which the offender was incarcerated, prior to being sentenced to a correctional institution in this state for the offense or offenses for which he or she is being classified.

History. Acts 1983, No. 825, §§ 1, 2; A.S.A. 1947, §§ 43-2830.1, 43-2830.2; Acts 2011, No. 570, § 93.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment added "Parole eligibility" and "but before January 1, 1994" in the section heading; and substituted "that" for "which" in four places.

16-93-607. Parole eligibility — Felonies committed on or after April 1, 1983 but before January 1, 1994.

(a) As used in this section, "felony" means a crime classified as Class Y, Class A, or Class B by the laws of this state.

(b) A person who committed a felony prior to April 1, 1983, and who was convicted and incarcerated for that felony, shall be eligible for release on parole in accordance with the parole eligibility law in effect at the time the crime was committed.

(c) A person who commits felonies on or after April 1, 1983, and who shall be convicted and incarcerated for that felony, shall be eligible for release on parole as follows:

(1) An inmate under sentence of death or life imprisonment without parole is not eligible for release on parole but may be pardoned or have their sentence commuted by the Governor, as provided by law. An inmate sentenced to life imprisonment is not eligible for release on parole unless the sentence is commuted to a term of years by executive clemency. Upon commutation, the inmate is eligible for release on parole as provided in this section;

(2) An inmate classified as a first offender under § 16-93-606, except one under the age of twenty-one (21) years as described in subsection (d) of this section and except one who pleads guilty or has been convicted of a Class Y felony, upon entering a correctional institution in this state under sentence from a circuit court, is not eligible for release on parole until a minimum of one-third (⅓) of the time to which the sentence is commuted by executive clemency is served, with credit for good-time allowances. However, if the trier of fact determines that a deadly weapon was used in the commission of the crime, a first offender twenty-one (21) years of age or older is not eligible for release on parole until a minimum of one-half (½) of the sentence is served, with credit for good-time allowances;

(3) An inmate classified as a second offender under § 16-93-606 and one who pleads guilty or was convicted of a Class Y felony, upon entering a correctional institution in this state under sentence from a circuit court, is not eligible for release on parole until a minimum of one-half (½) of his or her sentence shall have been served, with credit for good-time allowances, or one-half (½) of the time to which the sentence is commuted by executive clemency is served, with credit for good-time allowances;

(4) An inmate classified as a third offender under § 16-93-606, upon entering a correctional institution in this state under sentence from a circuit court, is not eligible for release on parole until a minimum of three-fourths (¾) of his or her sentence shall have been served, with credit for good-time allowances, or three-fourths (¾) of the time to which the sentence is commuted by executive clemency shall have been served, with credit for good-time allowances; and

(5) An inmate classified as a fourth offender under § 16-93-606, upon entering a correctional institution in this state under sentence from a circuit court, is not eligible for parole, but he or she shall be entitled to good-time allowances as provided by law.

(d) Any person under the age of twenty-one (21) years who is first convicted of a felony and committed to the first offender penal institution or to the Department of Correction for a term of years is eligible for parole at any time unless a minimum time to be served is imposed consisting of not more than one-third (⅓) of the total time sentenced. In the event the individual is sentenced to a minimum time to be served, he or she is eligible for release on parole after serving the minimum time prescribed, with credit for good-time allowances, and for commutation by the exercise of executive clemency.

(e)(1) When any convicted felon, while on parole, is convicted of another felony, the felon is to be committed to the Department of Correction to serve the remainder of his or her original sentence, including any portion suspended, with credit for good-time allowances. Upon conviction for the subsequent felony, the court shall require the sentence for the subsequent felony to be served consecutively with the sentence for the previous felony.

(2) Any person found guilty of a felony and placed on probation or suspended sentence therefor who is subsequently found guilty of

another felony committed while on probation or suspended sentence is to be committed to the Department of Correction to serve the remainder of his or her suspended sentence plus the sentence imposed for the subsequent felony. The sentence imposed for the subsequent felony is to be served consecutively with the remainder of the suspended sentence.

(f) For parole eligibility purposes, consecutive sentences by one (1) or more courts or for one (1) or more counts are to be considered as a single commitment reflecting the cumulative sentence to be served.

(g) Nothing in this section shall be construed to reduce, lessen, or in any manner take away or affect the good-time allowances earned by any individual prior to April 1, 1983.

History. Acts 1983, No. 825, §§ 1, 3; A.S.A. 1947, §§ 43-2830.1, 43-2830.3; Acts 2011, No. 570, § 94.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment added "Parole eligibility" and "but before January 1, 1994" in the section heading.

16-93-608. Parole eligibility — Class C or Class D felonies committed on or after April 1, 1983 but before January 1, 1994.

A person who commits a Class C felony or Class D felony on or after April 1, 1983, and who is incarcerated therefor is eligible for release on parole after having served one-third (⅓) of his or her sentence, with credit for good-time allowances, or one-third (⅓) of the time to which his or her sentence is commuted by executive clemency, with credit for good-time allowances.

History. Acts 1983, No. 825, § 4; A.S.A. 1947, § 43-2830.4; Acts 2011, No. 570, § 95.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment added "Parole eligibility" and "but before January 1, 1994" in the section heading.

16-93-611. [Repealed.]

Publisher's Notes. This section, concerning class Y felonies, was repealed by Acts 2011, No. 571, § 96. The section was derived from Acts 1995, No. 1326, § 1; 1997, No. 945, § 1; 1997, No. 1197, § 2; 1999, No. 717, § 1; 1999, No. 1268, § 4; 1999, No. 1337, § 1; 2005, No. 1034, § 1; 2009, No. 363, § 1.

CASE NOTES

Analysis

Applicability.
Eligibility for Parole.

Applicability.

Circuit court exceeded its authority in ruling on a parolee's motion, that the 70 percent parole-eligibility rule in this section was unconstitutionally revoked by Act 1782, because the ruling was entered almost a year after sentencing and because Ark. R. Civ. P. 60(a), allowing modification of a judgment, did not apply to criminal proceedings. State v. Rowe, 374 Ark. 19, 285 S.W.3d 614 (2008).

Eligibility for Parole.

After defendant's probation was revoked, trial counsel was not ineffective for failing to object to the trial court's determination that defendant had to serve 70 percent of his sentence before parole eligibility because, under subdivision (a)(1) of this section, a person convicted of possessing drug paraphernalia with the intent to manufacture methamphetamine and sentenced to imprisonment is not eligible for parole until serving 70 percent of any sentence received. Cox v. State, 365 Ark. 358, 229 S.W.3d 883 (2006).

Habeas petition of inmate convicted of first-degree murder was properly denied, pursuant to 28 U.S.C.S. § 2254(d), as the state courts did not unreasonably determine that inmate's representation was constitutionally effective even though he failed to inform inmate about the Arkansas rule requiring him to serve 70% of his sentence before being paroled. Buchheit v. Norris, 459 F.3d 849 (8th Cir. 2006).

16-93-612. Parole eligibility — Date of offense.

(a) A person's parole eligibility shall be determined by the laws in effect at the time of the offense for which he or she is sentenced to the Department of Correction.

(b) For an offender serving a sentence for a felony committed before April 1, 1977, § 16-93-601 governs that person's parole eligibility.

(c) For an offender serving a sentence for a felony committed between April 1, 1977, and April 1, 1983, § 16-93-604 governs that person's parole eligibility.

(d) For an offender serving a sentence for a felony committed on or after April 1, 1983, but before January 1, 1994, § 16-93-607 governs that person's parole eligibility.

(e) For an offender serving a sentence for a felony committed on or after January 1, 1994, § 16-93-614 governs that person's parole eligibility, unless otherwise noted and except:

(1) If the felony is murder in the first degree, § 5-10-102, kidnapping, if a Class Y felony, § 5-11-102(b)(1), aggravated robbery, § 5-12-103, rape, § 5-14-103, or causing a catastrophe, § 5-38-202(a), and the offense occurred after July 28, 1995, § 16-93-618 governs that person's parole eligibility; or

(2) If the felony is manufacturing methamphetamine, § 5-64-423(a) or the former § 5-64-401, or possession of drug paraphernalia with the intent to manufacture methamphetamine, the former § 5-64-403(c)(5), and the offense occurred after April 9, 1999, § 16-93-618 governs that person's parole eligibility;

(f) For an offender serving a sentence for a felony committed on or after January 1, 1994, § 16-93-615 governs that person's parole eligibility procedures.

History. Acts 2011, No. 570, § 97.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

16-93-613. Parole eligibility — Class Y, Class A, or Class B felonies.

(a) A person who commits a Class Y, Class A, or Class B felony, except those drug offenses addressed in § 16-93-619 or those Class Y felonies addressed in § 16-93-614 or § 16-93-618, and who shall be convicted and incarcerated for that felony, shall be eligible for release on parole as follows:

(1) An inmate under sentence of death or life imprisonment without parole is not eligible for release on parole but may be pardoned or have his or her sentence commuted by the Governor, as provided by law; and

(2)(A) An inmate sentenced to life imprisonment is not eligible for release on parole unless the sentence is commuted to a term of years by executive clemency.

(B) Upon commutation, the inmate is eligible for release on parole as provided in this subchapter.

(b) For parole eligibility purposes, consecutive sentences by one (1) or more courts or for one (1) or more counts are to be considered as a single commitment reflecting the cumulative sentence to be served.

History. Acts 2011, No. 570, § 98.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

16-93-614. Parole eligibility — Offenses committed after January 1, 1994.

(a) As used in this section and §§ 16-93-615 — 16-93-617, "felonies" means those crimes classified as Class Y, Class A, Class B, Class C, Class D, or unclassified felonies by the laws of this state.

(b)(1) A person who committed a felony before January 1, 1994, and who was convicted and incarcerated for that felony shall be eligible for release on parole under this section and §§ 16-93-615 — 16-93-617 in accordance with the parole eligibility law in effect at the time the crime was committed.

(2) A person who committed a target offense under the Community Punishment Act, § 16-93-1201 et seq., before January 1, 1994, and who has not been sentenced to a term of incarceration may waive the right to be released under the parole eligibility law in effect at the time the crime was committed and shall become eligible for judicial transfer pursuant to the transfer provisions provided in subdivision (c)(2) of this section.

(3) A person who has committed a felony who is within a target group as currently defined under § 16-93-1202(10) and who is released on parole shall be eligible, pursuant to rules and regulations established

by the Parole Board, for commitment to a community correction facility if he or she is found to be in violation of any of his or her parole conditions, unless the parole violation constitutes a nontarget felony offense.

(c) A person who commits a felony on or after January 1, 1994, and who shall be convicted and incarcerated for that felony shall be eligible for transfer to community correction as follows:

(1)(A) An inmate under sentence of death or life imprisonment without parole shall not be eligible for transfer, but may be pardoned or have his or her sentence commuted by the Governor as provided by law.

(B) An inmate sentenced to life imprisonment shall not be eligible for transfer unless his or her sentence is commuted to a term of years by executive clemency.

(C) Upon commutation, an inmate shall be eligible for transfer as provided in this section;

(2)(A)(i)*(a)* An offender convicted of a target offense under the Community Punishment Act, § 16-93-1201 et seq., may be committed to the Department of Correction and judicially transferred to the Department of Community Correction by specific provision in the commitment that the trial court order such a transfer.

(b) No other offender is eligible for transfer to a Department of Community Correction facility.

(ii) A copy of the commitment shall be forwarded immediately to the Department of Correction and to the Department of Community Correction.

(iii) In the event that an offender is sentenced to the Department of Correction without judicial transfer on one (1) sentence and concurrently sentenced to the Department of Correction with judicial transfer on another sentence, the offender shall remain in the Department of Correction, and the sentence with judicial transfer may be discharged in the same manner as that of an offender transferred back to the Department of Correction.

(B) The Department of Community Correction shall take over supervision of the offender in accordance with the order of the court.

(C) The Department of Community Correction shall provide for the appropriate disposition of the offender as expeditiously as practicable under rules and regulations developed by the Board of Corrections.

(D) The offender shall not be transported to the Department of Correction on the initial placement in a Department of Community Correction facility pursuant to a judicial transfer.

(E) An offender who is transferred back to the Department of Correction for disciplinary reasons may be considered for transfer to Department of Community Correction supervision after earning good-time credit equal to one-half (½) of the remainder of his or her sentence.

(F) An offender who is sentenced after July 31, 2007, and who is transferred back to the Department of Correction for administrative

reasons is eligible for transfer to Department of Community Correction supervision in the same manner as an offender who is sentenced to the Department of Correction without a judicial transfer to the Department of Community Correction; and

(3)(A) Every other classified or unclassified felon who is incarcerated therefor shall be eligible for transfer to community punishment after having served one-third (⅓) or one-half (½), with credit for meritorious good time, of his or her sentence depending on the seriousness determination made by the Arkansas Sentencing Commission, or one-half (½), with credit for meritorious good time, of the time to which his or her sentence is commuted by executive clemency.

(B) For example, a six-year sentence with optimal meritorious good-time credits will make the offender eligible for transfer in one (1) year if he or she is required to serve one-third (⅓) of his or her sentence, or one and one-half (1½) years if he or she is required to serve one-half (½) of his or her sentence.

History. Acts 2011, No. 570, § 99.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

16-93-615. Parole eligibility procedures — Offenses committed after January 1, 1994.

(a)(1)(A) An inmate under sentence for any felony, except those listed in subsection (b) of this section, shall be transferred from the Department of Correction to the Department of Community Correction under this section, § 16-93-614, § 16-93-616, and § 16-93-617, subject to rules promulgated by the Board of Corrections and conditions set by the Parole Board.

(B) The determination under subdivision (a)(1)(A) of this section shall be made by reviewing information such as the result of the risk-needs assessment to inform the decision of whether to release a person on parole by quantifying that person's risk to reoffend, and if parole is granted, this information shall be used to set conditions for supervision.

(C) The Parole Board shall begin transfer release proceedings or a preliminary review under this subchapter no later than six (6) months before a person's transfer eligibility date, and the Parole Board shall authorize jacket review procedures no later than six (6) months before a person's transfer eligibility at all institutions holding parole-eligible inmates to prepare parole applications.

(D) This review may be conducted without a hearing when the inmate has not received a major disciplinary report against him or her that resulted in the loss of good time, there has not been a request by a victim to have input on transfer conditions, and there is no indication in the risk-needs assessment review that special conditions need to be placed on the inmate.

(2)(A) When one (1) or more of the circumstances in subdivision (a)(1) of this section are present, the Parole Board shall conduct a hearing to determine the appropriateness of the inmate for transfer.

(B) The Parole Board has two (2) options:

(i) To transfer the individual to the Department of Community Correction accompanied by notice of conditions of the transfer, including without limitation:

(a) Supervision levels;

(b) Economic fee sanction;

(c) Treatment program;

(d) Programming requirements; and

(e) Facility placement when appropriate; or

(ii) To deny transfer based on a set of established criteria and to accompany the denial with a prescribed course of action to be undertaken by the inmate to rectify the Parole Board's concerns.

(C) Upon completion of the course of action determined by the Parole Board and after final review of the inmate's file to ensure successful completion, the Parole Board shall authorize the inmate's transfer to the Department of Community Correction under this section, § 16-93-614, § 16-93-616, and § 16-93-617, in accordance with administrative policies and procedures governing the transfer and subject to conditions attached to the transfer.

(3) Should an inmate fail to fulfill the course of action outlined by the Parole Board to facilitate transfer to community correction, it shall be the responsibility of the inmate to petition the Parole Board for rehearing.

(4)(A) The Parole Board shall conduct open meetings and shall make public its findings for each eligible candidate for parole.

(B)(i) Open meetings held under subsection (a)(2)(A) of this section may be conducted through video-conference technology if the person is housed at that time in a county jail and if the technology is available.

(ii) Open meetings utilizing video-conference technology shall be conducted in public.

(5) Inmate interviews may be closed to the public.

(b)(1) An inmate under sentence for one (1) of the following felonies shall be eligible for discretionary transfer to the Department of Community Correction by the Parole Board after having served one-third (⅓) or one-half (½) of his or her sentence, with credit for meritorious good time, depending on the seriousness determination made by the Arkansas Sentencing Commission, or one-half (½) of the time to which his or her sentence is commuted by executive clemency, with credit for meritorious good time:

(A) Any homicide, §§ 5-10-101 — 5-10-105, unless the offense is listed under § 16-93-612(e)(1);

(B) Sexual assault in the first degree, § 5-14-124;

(C) Sexual assault in the second degree, § 5-14-125;

(D) Battery in the first degree, § 5-13-201;

(E) Domestic battering in the first degree, § 5-26-303; or

(F) The following Class Y felonies:

(i) Kidnapping, § 5-11-102, unless the offense is listed under § 16-93-612(e)(1);

(ii) Rape, § 5-14-103, unless the offense is listed under § 16-93-612(e)(1);

(iii) Aggravated robbery, § 5-12-103, unless the offense is listed under § 16-93-612(e)(1); or

(iv) Causing a catastrophe, § 5-38-202(a), unless the offense is listed under § 16-93-612(e)(1);

(G) Engaging in a continuing criminal enterprise, § 5-64-405; or

(H) Simultaneous possession of drugs and firearms, § 5-74-106.

(2) The transfer of an offender convicted of an offense listed in subdivision (b)(1) of this section is not automatic.

(3)(A) Review of an inmate convicted of the enumerated offenses in subdivision (b)(1) of this section shall be based upon policies and procedures adopted by the Parole Board for the review, and the Parole Board shall conduct a risk-needs assessment review.

(B) The policies and procedures shall include a provision for notification of the victim or victims that a hearing shall be held and records kept of the proceedings and that there be a listing of the criteria upon which a denial may be based.

(4) Any transfer of an offender specified in this subsection shall be issued upon an order, duly adopted, of the Parole Board in accordance with such policies and procedures.

(5) After the Parole Board has fully considered and denied the transfer of an offender sentenced for committing an offense listed in subdivision (b)(1) of this section, the Parole Board may delay any reconsideration of the transfer for a maximum period of two (2) years.

(6) Notification of the court, prosecutor, sheriff, and the victim or the victim's next of kin for a person convicted of an offense listed in subdivision (b)(1) of this section shall follow the procedures set forth below:

(A)(i) Before the Parole Board shall grant any transfer, the Parole Board shall solicit the written or oral recommendations of the committing court, the prosecuting attorney, and the sheriff of the county from which the inmate was committed.

(ii) If the person whose transfer is being considered by the Parole Board was convicted of one (1) of the offenses enumerated in subdivision (b)(1) of this section, the Parole Board shall also notify the victim of the crime or the victim's next of kin of the transfer hearing and shall solicit written or oral recommendations of the victim or his or her next of kin regarding the granting of the transfer unless the prosecuting attorney has notified the Parole Board at the time of commitment of the prisoner that the victim or his or her next of kin does not want to be notified of future transfer hearings.

(iii) The recommendations shall not be binding upon the Parole Board in the granting of any transfer but shall be maintained in the inmate's file.

(iv) When soliciting recommendations from a victim of a crime, the Parole Board shall notify the victim or his or her next of kin of the date, time, and place of the transfer hearing;

(B)(i) The Parole Board shall not schedule transfer hearings at which victims or relatives of victims of crimes are invited to appear at a facility wherein inmates are housed other than the Central Administration Building of the Department of Correction at Pine Bluff.

(ii) Nothing herein shall be construed as prohibiting the Parole Board from conducting transfer hearings in two (2) sessions, one (1) at the place of the inmate's incarceration for interviews with the inmate, the inmate's witnesses, and correctional personnel, and the second session for victims and relatives of victims as set out in subdivision (b)(6)(B)(i) of this section;

(C)(i) At the time that any person eligible under subdivision (c)(1) of this section is transferred by the Parole Board, the Department of Community Correction shall give written notice of the granting of the transfer to the sheriff, the committing court, and the chief of police of each city of the first class of the county from which the person was sentenced.

(ii) If the person is transferred to a county other than that from which he or she was committed, the Parole Board shall give notice to the chief of police or marshal of the city to which he or she is transferred, to the chief of police of each city of the first class and the sheriff of the county to which he or she is transferred, and to the sheriff of the county from which the person was committed; and

(D)(i) It shall be the responsibility of the prosecuting attorney of the county from which the inmate was committed to notify the Parole Board at the time of commitment of the desire of the victim or his or her next of kin to be notified of any future transfer hearings and to forward to the Parole Board the last known address and telephone number of the victim or his or her next of kin.

(ii) It shall be the responsibility of the victim or his or her next of kin to notify the Parole Board of any change in address or telephone number.

(iii) It shall be the responsibility of the victim or his or her next of kin to notify the Parole Board after the date of commitment of any change in regard to the desire to be notified of any future transfer hearings.

(c)(1) In all other felonies, before the Parole Board sets conditions for transfer of an inmate to community punishment, a victim, or his or her next of kin in cases in which the victim is unable to express his or her wishes, who has expressed the wish to be consulted by the Parole Board shall be notified of the date, time, and place of the transfer hearing.

(2)(A) A victim or his or her next of kin who wishes to be consulted by the Parole Board shall inform the Parole Board in writing at the time of sentencing.

(B) A victim or his or her next of kin who does not so inform the Parole Board shall not be notified by the Parole Board.

(3)(A) Victim input to the Parole Board shall be limited to oral or written recommendations on conditions relevant to the offender under review for transfer.

(B) The recommendations shall not be binding on the Parole Board, but shall be given due consideration within the resources available for transfer.

(d)(1) The Parole Board shall approve a set of conditions that shall be applicable to all inmates transferred from the Department of Correction to the Department of Community Correction.

(2) The set of conditions is subject to periodic review and revision as the Parole Board deems necessary.

(e)(1) The course of action required by the Parole Board shall not be outside the current resources of the Department of Correction nor the conditions set be outside the current resources of the Department of Community Correction.

(2) However, the Department of Correction and Department of Community Correction shall strive to accommodate the actions required by the Board of Corrections to the best of their ability.

(f) Transfer is not an award of clemency, and it shall not be considered as a reduction of sentence or a pardon.

(g) Every inmate while on transfer status shall remain in the legal custody of the Department of Correction under the supervision of the Department of Community Correction and subject to the orders of the Parole Board.

(h) An inmate who is sentenced under the provisions of § 5-4-501(c) or § 5-4-501(d) for a serious violent felony or a felony involving violence may be considered eligible for parole or for community correction transfer upon reaching regular parole or transfer eligibility, but only after reaching a minimum age of fifty-five (55) years.

(i) Decisions on parole release, courses of action applicable prior to transfer, and transfer conditions to be set by the Parole Board shall be based on a reasoned and rational plan developed in conjunction with an accepted risk-needs assessment tool such that each decision is defensible based on preestablished criteria.

History. Acts 2011, No. 570, § 100.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

16-93-616. Parole eligibility procedures — Offenses committed after January 1, 1994 — Computation of sentence.

(a)(1) Time served for a sentence shall be deemed to begin on the day sentence is imposed, not on the day a prisoner is received by the Department of Correction.

(2) Time served shall continue only during the time in which an individual is actually confined in a county jail or other local place of

lawful confinement or while under the custody and supervision of the department.

(3) Once sentenced to the department, the department shall retain legal custody of the inmate for the duration of the original sentence.

(b) The sentencing judge shall direct, when he or she imposes sentence, that time already served by the defendant in jail or other place of detention shall be credited against the sentence.

History. Acts 2011, No. 570, § 101.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

16-93-617. Parole eligibility procedures — Offenses committed after January 1, 1994 — Revocation of transfer.

(a) In the event an offender transferred under this section, §§ 16-93-614 — 16-93-616, or § 16-93-618 violates the terms or conditions of his or her transfer, a hearing shall follow all applicable legal requirements and shall be subject to any additional policies, rules, and regulations set by the Parole Board.

(b)(1) In the event an offender transferred under this section and §§ 16-93-614 — 16-93-617, or § 16-93-618 is found to be or becomes ineligible for transfer into a Department of Community Correction facility, he or she shall be transported to the Department of Correction to serve the remainder of his sentence.

(2) Notice of the ineligibility and the reasons therefor shall be provided to the offender, and a hearing may be requested before the board if the offender contests the factual basis of the ineligibility. Otherwise, the board may administratively approve the transfer to the Department of Correction.

(c) An offender who is judicially transferred to a Department of Community Correction facility and subsequently transferred back to the Department of Correction by the board for disciplinary or administrative reasons may not become eligible for any further transfer under § 16-93-614(c)(2)(E) and (F).

History. Acts 2011, No. 570, § 102.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

16-93-618. Parole eligibility — Certain Class Y felony offenses and certain methamphetamine offenses — Seventy-percent crimes.

(a)(1) Notwithstanding any law allowing the award of meritorious good time or any other law to the contrary, any person who is found guilty of or pleads guilty or nolo contendere to subdivisions (a)(1)(A)-(H) of this section shall not be eligible for parole or community punishment transfer, except as provided in subdivision (a)(3) or subsection (c) of this

section, until the person serves seventy percent (70%) of the term of imprisonment to which the person is sentenced, including a sentence prescribed under § 5-4-501:

(A) Murder in the first degree, § 5-10-102;

(B) Kidnapping, Class Y felony, § 5-11-102;

(C) Aggravated robbery, § 5-12-103;

(D) Rape, § 5-14-103;

(E) Causing a catastrophe, § 5-38-202(a);

(F) Manufacturing methamphetamine, § 5-64-423(a) or the former § 5-64-401;

(G) Trafficking methamphetamine, § 5-64-440(b)(1); or

(H) Possession of drug paraphernalia with the purpose to manufacture methamphetamine, the former § 5-64-403(c)(5) .

(2)(A) The seventy-percent provision of subdivision (a)(1) of this section has no application to any person who is found guilty of or pleads guilty or nolo contendere to kidnapping, Class B felony, § 5-11-102, regardless of the date of the offense.

(B) The provisions of this section shall apply retroactively to all persons presently serving a sentence for kidnapping, Class B felony, § 5-11-102.

(3)(A)(i) Regardless of the date of the offense, the seventy-percent provision under subdivision (a)(1) of this section shall include credit for the award of meritorious good time under § 12-29-201 to any person who is found guilty of or pleads guilty or nolo contendere to:

(a) Manufacturing methamphetamine, § 5-64-423(a) or the former § 5-64-401;

(b) Trafficking methamphetamine, § 5-64-440(b)(1); or

(c) Possession of drug paraphernalia with the purpose to manufacture methamphetamine, the former § 5-64-403(c)(5).

(ii) Regardless of the date of the offense and unless the person is sentenced to a term of life imprisonment, the seventy-percent provision under subdivision (a)(1) of this section may include credit for the award of meritorious good time under § 12-29-202 to any person who is found guilty of or pleads guilty or nolo contendere to:

(a) Manufacturing methamphetamine, § 5-64-423(a) or the former § 5-64-401;

(b) Trafficking methamphetamine, § 5-64-440(b)(1); or

(c) Possession of drug paraphernalia with the purpose to manufacture methamphetamine, the former § 5-64-403(c)(5) .

(B) In no event shall the time served by any person who is found guilty of or pleads guilty or nolo contendere to manufacturing methamphetamine, § 5-64-423(a) or the former § 5-64-401, trafficking methamphetamine, § 5-64-440(b)(1), or possession of drug paraphernalia with the purpose to manufacture methamphetamine, § 5-64-443(a)(2)(B), be reduced to less than fifty percent (50%) of the person's original sentence.

(4)(A) When any person sentenced under subdivision (a)(3) of this section becomes eligible for parole, the Department of Community

Correction shall send a notice of the parole hearing to the prosecuting attorney of the judicial district or districts in which the person was found guilty or pleaded guilty or nolo contendere to an offense listed in subdivision (a)(1) of this section.

(B) The notice shall contain the following language in 12-point capital letters bold type: "INMATE SENTENCED UNDER ARKANSAS CODE § 16-93-618".

(b) A jury may be instructed under § 16-97-103 regarding the awarding of meritorious good time under subdivision (a)(3) of this section.

(c) The sentencing judge, in his or her discretion, may waive subsection (a) of this section under the following circumstances:

(1) The defendant was a juvenile at the time of the offense;

(2) The juvenile was merely an accomplice to the offense; and

(3) The offense occurred on or after July 28, 1995.

(d) The awarding of meritorious good time under § 12-29-201 or § 12-29-202 shall not be applicable to persons sentenced under subdivisions (a)(1)(A)-(H) of this section.

(e) A person who commits the offense of possession of drug paraphernalia with the intent to manufacture methamphetamine, § 5-64-443, after the effective date of this act shall not be subject to the provisions of this section.

History. Acts 2011, No. 570, § 103.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Subchapter 7 — Parole

16-93-701. Authority to grant and parameters.

(a)(1) The Parole Board may release on parole any individual eligible under the provisions of § 16-93-601 who is confined in any correctional institution administered by the Department of Correction, when in its

opinion there is a reasonable probability that the prisoner can be released without detriment to the community or himself or herself.

(2) All paroles shall issue upon order, duly adopted, of the board.

(b)(1) Before ordering the release of any prisoner, the prisoner shall be interviewed by the board or a panel designated by the board and, for all parole decisions after January 1, 2012, the board shall conduct a risk-needs assessment review of all parole applicants.

(2)(A) The parole shall be ordered only for the best interest of society and not as an award for clemency.

(B) The parole shall not be considered as a reduction of sentence or a pardon.

(3) A prisoner shall be placed on parole only when the board believes that he or she is able and willing to fulfill the obligations of a law-abiding citizen.

(4) Every prisoner, while on parole, shall remain in the legal custody of the institution from which he or she was released, but shall be subject to the orders of the board.

History. Acts 1968 (1st Ex. Sess.), No. 50, § 29; A.S.A. 1947, § 43-2808; Acts 1989, No. 937, § 6; 2011, No. 570, § 104.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment, in the section heading, substituted "Authority to grant" for "Grant" and "parameters" for "procedures generally"; added "and, for all parole decisions after January 1, 2012, the board shall conduct a risk-needs assessment review of all parole applicants" in (b)(1); and inserted "or she" in (b)(4).

16-93-702. Procedures — Required recommendations.

(a) Before the Parole Board shall grant any parole, the board shall solicit the written or oral recommendations of the committing court, the prosecuting attorney, and the sheriff of the county from which the inmate was committed.

(b) If the person whose parole is being considered by the board was convicted of capital murder, § 5-10-101, or of a Class Y, Class A, or Class B felony, or any violent or sexual offense, the board shall also notify the victim of the crime, or the victim's next of kin, of the parole hearing and shall solicit written or oral recommendations of the victim or the victim's next of kin regarding the granting of the parole, unless the prosecuting attorney has notified the board at the time of commitment of the prisoner that the victim or the victim's next of kin does not want to be notified of future parole hearings.

(c) The board shall retain a copy of the recommendations in the board's file.

(d) The recommendations shall not be binding upon the board in the granting of any parole but shall be maintained in a file that shall be open to the public during reasonable business hours.

(e) When soliciting recommendations from a victim of a crime, the board shall notify the victim or the victim's next of kin of the date, time, and place of the parole hearing.

History. Acts 1969, No. 153, § 1; 1981, No. 530, § 1; 1983, No. 8, § 1; 1983, No. 246, § 1; 1985, No. 269, § 1; 1985, No. 917, § 1; A.S.A. 1947, § 43-2819; Acts 1997, No. 1262, § 17; 2011, No. 570, § 104.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment substituted "Procedures" for "Grant" in the section heading; and substituted "that" for "which" in (d).

16-93-703. Procedures — Place of hearings.

(a) The Parole Board shall not schedule parole hearings at which victims or relatives of victims of crime are invited to appear at a facility wherein inmates are housed other than the Central Administration Building of the Department of Correction at Pine Bluff.

(b) Nothing in this section shall be construed as prohibiting the board from conducting parole hearings in two (2) sessions, one (1) at the place of the inmate's incarceration for interviews with the inmate, the inmate's witnesses, and correctional personnel, and the second session for victims and relatives of victims as set out in subsection (a) of this section.

History. Acts 1983, No. 525, §§ 1, 2; A.S.A. 1947, §§ 43-2819.1, 43-2819.2; Acts 2011, No. 570, § 104.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment substituted "Procedures" for "Grant" in the section heading.

16-93-704. Procedures — Notice to law enforcement personnel and committing court.

(a) At the time that any person is paroled by the Parole Board, the board shall give written notice of the granting of the parole to the sheriff, the committing court, and the chief of police of all cities of the first class of the county from which the person was sentenced.

(b) If the person is paroled to a county other than that from which he or she was committed, the board shall give notice to the chief of police or marshal of the city to which he or she is paroled, to the chief of police of all cities of the first class, to the sheriff of the county to which he or she is paroled, and to the sheriff of the county from which the person was committed.

History. Acts 1969, No. 153, § 2; 1971, No. 33, § 1; A.S.A. 1947, § 43-2820; Acts 2011, No. 570, § 104.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment substituted "Procedures" for "Grant" in the section heading; and substituted "all

cities of the first class, to the sheriff" for "all cities of the first class and to the sheriff" in (b).

16-93-705. Revocation — Procedures and hearings generally.

(a)(1) At any time during a parolee's release on parole, the Parole Board may issue a warrant for the arrest of the parolee for violation of any conditions of parole or may issue a notice to appear to answer a charge of a violation.

(2) The warrant or notice shall be served personally upon the individual.

(3) The warrant shall authorize all officers named in the warrant to place the parolee in custody at any suitable detention facility pending a hearing.

(4) Any parole officer may arrest a parolee without a warrant or may deputize any officer with power of arrest to do so by giving him or her a written statement setting forth that the parolee, in the judgment of the parole officer, violated conditions of his or her parole.

(5) The written statement delivered with the parolee by the arresting officer to the official in charge of the detention facility to which the parolee is brought shall be sufficient warrant for detaining him or her pending disposition.

(6) If the board or its designee finds, by a preponderance of the evidence, that the parolee has inexcusably failed to comply with a condition of his or her parole, the parole may be revoked at any time prior to the expiration of the period of parole.

(7) A parolee for whose return a warrant has been issued by the board shall be deemed a fugitive from justice if it is found that the warrant cannot be served.

(8) The board shall determine whether the time from the issuance of the warrant to the date of arrest, or any part of it, shall be counted as time served under the sentence.

(b)(1) A parolee arrested for violation of parole shall be entitled to a preliminary hearing to determine whether there is reasonable cause to believe that he or she has violated a condition of parole.

(2) The hearing shall be conducted by the parole hearing examiner for the board as soon as practical after arrest and reasonably near the place of the alleged violation or arrest.

(3) The parolee shall be given prior notice of the date, time, and location of the hearing, the purpose of the hearing, and the conditions of parole he or she is alleged to have violated.

(4) Except as provided in subsection (d) of this section, the parolee shall have the right to hear and controvert evidence against him or her, to offer evidence in his or her own behalf, and to be represented by counsel.

(5) If the hearing examiner finds that there is reasonable cause to believe that the parolee has violated a condition of parole, the hearing examiner may order the parolee returned to the custody of the Department of Correction for a revocation hearing before the board.

(6) If the hearing examiner finds that there is reasonable cause to believe that the parolee has violated a condition of parole, the hearing examiner may return the offender to parole supervision rather than to the custody of the Department of Correction and may impose additional supervision conditions in response to the violating conduct.

(7) If the hearing examiner does not find reasonable cause, he or she shall order the parolee released from custody, but that action shall not bar the board from holding a hearing on the alleged violation of parole or from ordering the parolee to appear before it.

(8) The hearing examiner shall prepare and furnish to the board and the parolee a summary of the hearing, including the substance of the evidence and testimony considered.

(c)(1) A parole shall not be revoked except after a revocation hearing, which shall be conducted by the board or its designee within a reasonable period of time after the parolee's arrest.

(2) The parolee shall be given prior notice of the date, time, and location of the hearing, the purpose of the hearing, and the conditions of parole he or she is alleged to have violated.

(3) Except as provided in subsection (d) of this section, the parolee shall have the right to hear and controvert evidence against him or her, to offer evidence in his or her own defense, and to be represented by counsel.

(4) If parole is revoked, the board or its designee shall prepare and furnish to the parolee a written statement of evidence relied on and the reasons for revoking parole.

(d) At a preliminary hearing under subsection (b) of this section or a revocation hearing under subsection (c) of this section:

(1) The parolee shall have the right to confront and cross-examine adverse witnesses unless the hearing examiner or the board or its designee specifically finds good cause for not allowing confrontation; and

(2) The parolee may introduce any relevant evidence of the alleged violation, including letters, affidavits, and other documentary evidence, regardless of its admissibility under the rules governing the admission of evidence.

(e) A preliminary hearing under subsection (b) of this section shall not be required if:

(1) The parolee waives a preliminary hearing; or

(2) The revocation hearing under subsection (c) of this section is held promptly after the arrest and reasonably near the place where the alleged violation occurred or where the parolee was arrested.

(f) A preliminary hearing under subsection (b) of this section and a revocation hearing under subsection (c) of this section shall not be necessary if the revocation is based on the parolee's conviction, guilty plea, or plea of nolo contendere to a felony offense for which he or she is sentenced to the Department of Correction or to any other state or federal penal institution.

History. Acts 1968 (1st Ex. Sess.), No. 50, § 31; 1983, No. 771, § 1; A.S.A. 1947, § 43-2810; 2011, No. 570, § 104.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment substituted "Revocation — Procedures and hearings generally" for "Revocation — Return of parole violator — Hearings" in the section heading; and inserted (b)(6) and redesignated the remaining subdivisions accordingly.

16-93-706. Revocation — Subpoena of witnesses and documents.

(a)(1) The Chair of the Parole Board or his or her designee, the hearing officer presiding over any preliminary hearing with respect to an alleged parole violation, the administrator of the board, or any member of the board pursuant to the authority of the board to meet and determine whether to revoke parole shall have the power to issue oaths and to subpoena witnesses to appear and testify and bring before the hearing officer or the board any relevant books, papers, records, or documents.

(2) The subpoena shall be directed to any sheriff, coroner, or constable of any county where the designated witness resides or is found. The endorsed affidavit on the subpoena of any person of full age shall be proof of the service, which shall be served and returned in the same manner as subpoenas in civil actions in the circuit courts are served and returned.

(b) The fees and mileage expenses as prescribed by law for witnesses in civil cases shall be paid by the Department of Correction.

(c)(1) In case of failure or refusal by any person to comply with a subpoena issued under this section to testify or answer to any matter regarding which the person may be lawfully interrogated, any circuit court in this state, on application of the hearing officer or the chair, shall, in term or vacation, issue an attachment for the person and compel him or her to comply with the subpoena and appear before the hearing officer or the board and to produce any testimony and documents as may be required.

(2) The circuit court shall have the power to punish any contempt, in case of disobedience, as in civil cases, or it shall be a misdemeanor for a witness to refuse or neglect to appear and testify, punishable upon conviction by a fine of not less than fifty dollars ($50.00) nor more than five hundred dollars ($500).

(d) Any person willfully testifying falsely under oath before the board or at a preliminary hearing in which probable cause for parole revocation is to be considered as to any matter material to a lawful inquiry by the board or hearing officer may be charged with perjury and upon conviction punished accordingly.

History. Acts 1975, No. 735, §§ 1-4; A.S.A. 1947, §§ 43-2824 — 43-2827; Acts 2011, No. 570, § 104.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment

substituted "Subpoena of witnesses and documents" for "Powers of officials and circuit courts — Penalties" in the section heading.

16-93-708. Parole alternative — Home detention.

(a) As used in this section:

(1) "Approved electronic monitoring or supervising device" means any electronic device approved by the Board of Corrections that meets the minimum Federal Communications Commission regulations and requirements, and that is limited in capability to recording or transmitting information as to the criminal defendant's presence in the home;

(2) "Permanently incapacitated" means an inmate who, as determined by a licensed physician:

(A) Has a medical condition that is not necessarily terminal but renders him or her permanently and irreversibly incapacitated; and

(B) Requires immediate and long-term care; and

(3) "Terminally ill" means an inmate who, as determined by a licensed physician:

(A) Has an incurable condition caused by illness or disease; and

(B) Will likely die within two (2) years due to the illness or disease.

(b)(1)(A) Subject to the provisions of subdivision (b)(2) of this section, a defendant convicted of a felony or misdemeanor and sentenced to imprisonment may be incarcerated in a home detention program when the Director of the Department of Correction or the Director of the Department of Community Correction shall communicate to the Parole Board when, in the independent opinions of either a Department of Correction physician or Department of Community Correction physician and a consultant physician in Arkansas, an inmate is either terminally ill or permanently incapacitated and should be considered for transfer to parole supervision.

(B) The Director of the Department of Correction or the Director of the Department of Community Correction shall make the facts described in subdivision (b)(1)(A) of this section known to the Parole Board for consideration of early release to home detention.

(2) The Board of Corrections shall promulgate rules that will establish policy and procedures for incarceration in a home detention program.

(c)(1) In all instances where the Department of Correction may release any inmate to community supervision, in addition to all other conditions that may be imposed by the Department of Correction, the Department of Correction may require the criminal defendant to participate in a home detention program.

(2)(A) The term of the home detention shall not exceed the maximum number of years of imprisonment or supervision to which the inmate could be sentenced.

(B) The length of time the defendant participates in a home detention program and any good-time credit awarded shall be credited against the defendant's sentence.

(d) The Board of Corrections shall establish policy and procedures for participation in a home detention program, including, but not limited to, program criteria, terms, and conditions of release.

History. Acts 1991, No. 263, §§ 1-3; 1991, No. 307, §§ 1-3; 2005, No. 680, § 3; 2011, No. 570, § 104.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment added "Parole alternative" in the section heading; inserted the introductory language of (a), the (a)(1) designation, (a)(2), and (a)(3); added "the Director of the Department of Correction ... considered for transfer to parole supervision" at the end of (b)(1)(A); deleted (b)(1)(A)(i) and (b)(1)(A)(ii); and substituted "Department of Correction" for "department" in three places in (c)(1).

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

16-93-709. Sex offender may not reside with minors.

(a) Whenever an inmate in a facility of the Department of Correction who has been found guilty of or has pleaded guilty or nolo contendere to any sexual offense defined in § 5-14-101 et seq., or incest as defined by § 5-26-202, and the sexual offense or incest was perpetrated against a minor, becomes eligible for parole and makes application for release on parole, the Parole Board shall prohibit, as a condition of granting the parole, the parolee from residing upon parole in a residence with any minor, unless the board makes a specific finding that the inmate poses no danger to the minors residing in the residence.

(b) If the board, upon a hearing under § 16-93-705, finds, by a preponderance of the evidence, that the parolee has failed to comply with this condition of parole, the parole may be revoked and the parolee returned to the custody of the department.

History. Acts 1997, No. 1188, § 2; 2011, No. 570, § 104.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment substituted "under" for "pursuant to" in (b).

16-93-710. Parole for inmates who have served their term of imprisonment in a county jail prior to being processed into the Department of Correction.

(a)(1) Subject to conditions set by the Parole Board, an offender convicted of a felony and sentenced to a term of imprisonment of two (2) years or less in the Department of Correction, and who has served his or her term of imprisonment in a county jail prior to being processed into the Department of Correction, may be paroled from the Department of Correction county jail backup facility directly to the Depart-

ment of Community Correction under parole supervision, and upon eligibility determination, processed for release by the board.

(2) Transfer release proceedings or a preliminary review under this subchapter shall begin no later than six (6) months prior to a person's transfer eligibility date, and the Parole Board shall authorize jacket review procedures at all institutions holding parole-eligible inmates to prepare parole applications to comply with this time frame.

(3) The jacket review will be conducted by staff either from the Department of Community Correction or by Department of Correction.

(b) An offender who has been found guilty of or pleaded guilty or nolo contendere to a violent offense as defined by § 5-4-501(c)(2) or a Class Y felony offense shall be ineligible under this section.

(c) As determined by the county sheriff, an offender who has committed violent or sexual acts while incarcerated in a county jail facility shall be ineligible to participate in the program established by this section.

History. Acts 2011, No. 570, § 104.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

16-93-711. Parole alternatives — Electronic monitoring of parolees.

(a) As used in this section, "approved electronic monitoring or supervising device" means a device described in § 16-93-708(a).

(b)(1)(A) Subject to the provisions of subdivision (b)(2) of this section, an inmate serving a sentence in the Department of Correction may be released from incarceration if the:

(i) Sentence was not the result of a jury or bench verdict;

(ii) Inmate has served one hundred twenty (120) days of his or her sentence;

(iii) Inmate has an approved parole plan;

(iv) Inmate was sentenced from a cell in the sentencing guidelines that does not include incarceration in the presumptive range;

(v) Conviction is for a Class C or Class D felony;

(vi) Conviction is not for a crime of violence, regardless of felony level;

(vii) Conviction is not a sex offense, regardless of felony level;

(viii) Conviction is not for manufacturing methamphetamine, § 5-64-423(a) or the former § 5-64-401;

(ix) Conviction is not for possession of drug paraphernalia with the purpose to manufacture methamphetamine, § 5-64-443, if the conviction is a Class C felony or higher;

(x) Conviction is not a crime involving the threat of violence or bodily harm;

(xi) Conviction is not for a crime that resulted in a death; and

(xii) Inmate has not previously failed a drug court program.

(B) The Director of the Department of Correction or the Director of the Department of Community Correction shall make the facts described in subdivision (b)(1)(A) of this section known to the Parole Board for consideration of electronic monitoring.

(2) The Board of Corrections shall promulgate rules that will establish policy and procedures for an electronic monitoring program.

(c)(1) An inmate released from incarceration on parole under this section shall be supervised by the Department of Community Correction using electronic monitoring until the inmate's transfer eligibility date or for at least ninety (90) days of full compliance by the inmate, whichever is sooner.

(2)(A) The term of electronic monitoring shall not exceed the maximum number of years of imprisonment or supervision to which the inmate could be sentenced.

(B) The length of time the defendant participates in an electronic monitoring program and any good-time credit awarded shall be credited against the defendant's sentence.

History. Acts 2011, No. 570, § 104.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

16-93-712. Parole supervision.

(a)(1) The Parole Board shall establish written policies and procedures governing the supervision of parolees designed to enhance public safety and to assist the parolees in reintegrating into society.

(2)(A) The supervision of parolees shall be based on evidence-based practices including a validated risk-needs assessment.

(B) Decisions shall target the parolee's criminal risk factors with appropriate supervision and treatment designed to reduce the likelihood of reoffense.

(b) A parole officer shall:

(1) Investigate each case referred to him or her by the Director of the Parole Board, the Department of Community Correction, or the prosecuting attorney;

(2) Furnish to each parolee under his or her supervision a written statement of the conditions of parole and instruct the parolee that he or she must stay in compliance with the conditions of parole or risk revocation under § 16-93-705;

(3) Develop a case plan for each individual who is assessed as being moderate to high risk to reoffend based on the risk and needs assessment that targets the criminal risk factors identified in the assessment, is responsive to individual characteristics, and provides supervision of offenders according to that case plan;

(4) Stay informed of the parolee's conduct and condition through visitation, required reporting, or other methods and shall report to the board that information upon request;

(5) Use practicable and suitable methods that are consistent with evidence-based practices to aid and encourage a parolee to improve his or her conduct and condition and to reduce the risk of recidivism;

(6)(A) Conduct a validated risk-needs assessment of the parolee, including without limitation criminal risk factors and specific individual needs.

(B) The actuarial assessment shall include an initial screening and, if necessary, a comprehensive assessment;

(7) Make decisions with the assistance of the risk-needs assessment that are consistent with evidence-based practices on the type of supervision and services necessary to each parolee; and

(8) Receive annual training on evidence-based practices and criminal risk factors, as well as instruction on how to target these factors to reduce recidivism.

(c)(1) The department shall allocate resources, including the assignment of parole officers, to focus on moderate-risk and high-risk offenders as determined by the validated risk-needs assessment provided in subdivision (b)(6) of this section.

(2) The department shall require each public and private treatment and service provider that receives state funds for the treatment of or service for parolees to use evidence-based programs and practices.

(d)(1) The department shall have the authority to sanction a parolee administratively without engaging the revocation process under § 16-93-705.

(2)(A) The department shall develop an intermediate sanctions procedure and grid to guide a parole officer in determining the appropriate response to a violation of conditions of supervision.

(B) Intermediate sanctions administered by the department are required to conform to the sanctioning grid.

(3) Intermediate sanctions shall include without limitation:

(A) Day reporting;

(B) Community service;

(C) Increased substance abuse screening or treatment, or both;

(D) Increased monitoring, including electronic monitoring and home confinement; and

(E)(i) Incarceration in a county jail for no more than seven (7) days.

(ii) Incarceration as an intermediate sanction shall not be used more than ten (10) times with an individual parolee, and no parolee shall accumulate more than thirty (30) days incarceration as an intermediate sanction before the parole officer files for revocation under § 16-93-706.

History. Acts 2011, No. 570, § 104.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Subchapter 10 — Community Service Work — Acts 1989, No. 957

SECTION.
16-93-1001 — 16-93-1004. [Repealed.]

16-93-1001 — 16-93-1004. [Repealed.]

Publisher's Notes. This subchapter, concerning community service work — Acts 1989, No. 957, was repealed by Acts 2011, No. 570, § 105. The subchapter was derived from the following sources:

16-93-1001. Acts 1989, No. 957, § 1.
16-93-1002. Acts 1989, No. 957, § 2.
16-93-1003. Acts 1989, No. 957, § 6.
16-93-1004. Acts 1989, No. 957, §§ 3, 4; 1991, No. 545, §§ 1, 2.

Subchapter 11 — Community Service Work — Acts 1989, No. 613

SECTION.
16-93-1101 — 16-93-1105. [Repealed.]

16-93-1101 — 16-93-1105. [Repealed.]

Publisher's Notes. This subchapter, concerning community service work — Acts 1989, No. 613, was repealed by Acts 2011, No. 570, § 106. The subchapter was derived from the following sources:

16-93-1101. Acts 1989, No. 613, § 1.
16-93-1102. Acts 1989, No. 613, § 2.
16-93-1103. Acts 1989, No. 613, § 3.
16-93-1104. Acts 1989, No. 613, § 4; 1991, No. 542, § 5.
16-93-1105. Acts 1989, No. 613, § 5.

Subchapter 12 — Community Punishment

SECTION.
16-93-1202. Definitions.
16-93-1206. [Repealed.]
16-93-1207. Order of court.

16-93-1202. Definitions.

As used in this subchapter:

(1) "Board" means the Board of Corrections;

(2) "Community correction" means:

(A) Probation, a judicially imposed criminal sanction permitting varying levels of supervision of eligible offenders in the community;

(B) Economic sanctions programs, including an active organized collection of fees, fines, restitution, day fines, day reporting centers, and penalties attached for nonpayment of fines;

(C) Home detention programs, ranging from curfew programs to house arrest with and without electronic monitoring;

(D) Community service programs, including both supervised and unsupervised work assignments and projects such that offenders provide substantial labor benefit to the community;

(E) Work-release programs, including residential and nonresidential forms of labor, with salary, in the community;

(F) Restitution programs, an organized collection and dissemination of restitution by a designated entity within the community punishment range of services, including, when necessary, the use of restitution

centers such that the offender is held accountable and the victim receives restitution ordered by the court in a timely fashion;

(G)(i) Community correction facilities, multipurpose facilities encompassing security, punishment, and services such that offenders can be housed therein when necessary but can also be assigned to or access correction programs and services which are housed there.

(ii) Included therein are revocation centers, restitution centers, work-release centers, and community correction centers;

(H) Boot camps, highly regimented programs encompassing strict discipline, education, treatment, and counseling designed to have the greatest positive impact on the offender in the shortest period of time;

(I) Drug and alcohol treatment services, including both inpatient and outpatient drug and alcohol abuse treatment and counseling provided by qualified community correction service provider programs for correctional clients;

(J) Educational programs, including programs focused on the acquisition of basic learning skills, general educational developmental preparation, literacy training, and other applicable areas of education that are of value to correctional clients;

(K) Vocational programs, focused on the learning of a marketable skill by correctional clients utilizing qualified vocational and technical community correction service provider programs whenever possible;

(L) Job skills programs, focused on the acquisition of basic job skills, especially those related to how to get a job and how to keep a job;

(M) Mental health treatment services, including both inpatient and outpatient mental health, family, and psychological counseling and treatment provided by qualified community correction service provider programs for correctional clients;

(N) Parole, an administrative condition permitting state supervision of eligible offenders sentenced to state correctional facilities and released therefrom to community correction programs or supervision;

(O) Post prison supervision, an administrative condition permitting state supervision of offenders sentenced to state correctional facilities and transferred from there to community correction programs or community supervision; and

(P) Pretrial programs, including the supervision and monitoring of certain defendants while awaiting sentencing or disposition by a court;

(3) "Community correction service provider program" means a public or private organization which provides treatment, guidance, training, support, or other rehabilitative services to individual offenders, offender groups, and their families in such areas as health, education, vocational training, special education, social services, psychological counseling, alcohol and drug treatment, and other applicable correctional concerns;

(4) "Department of Community Correction" means the administrative structure in place to oversee the development and operation of community correction facilities, programs, and services, including probation and parole supervision;

(5) "Department of Correction" means the administrative structure in place to oversee the daily operation of secure prison facilities;

(6) "Eligibility" or "eligible offender" means any person convicted of a felony who is by law eligible for such sentence and who falls within the population targeted by the General Assembly for inclusion in community correction facilities or who is otherwise under the supervision of the Department of Community Correction;

(7) "Incarceration" means commitment to the Department of Correction;

(8) "Supervision" means direct supervision at varying levels of intensity by either probation officers, in the case of sentences to probation with a condition of community correction, or parole and post prison supervision officers, in the case of offenders eligible for release on parole or offenders transferred to community correction or community supervision from the Department of Correction;

(9) "Suspended imposition of sentence" means a procedure whereby a defendant who pleads or is found guilty of an offense is released by the court without pronouncement of sentence and without supervision.

(10)(A)(i) "Target group" means a group of offenders and offenses determined to be, but not limited to, theft, theft by receiving, hot checks, residential burglary, commercial burglary, failure to appear, fraudulent use of credit cards, criminal mischief, breaking or entering, drug paraphernalia, driving while intoxicated, fourth or subsequent offense, all other Class C or Class D felonies that are not either violent or sexual and that meet the eligibility criteria determined by the General Assembly to have significant impact on the use of correctional resources, Class A and Class B controlled substance felonies, and all other unclassified felonies for which the prescribed limitations on a sentence do not exceed the prescribed limitations for a Class C felony and that are not either violent or sexual.

(ii) Offenders committing solicitation, attempt, or conspiracy of the substantive offenses listed in subdivision (10)(A)(i) of this section are also included in the group.

(iii) For the purposes of this subdivision (10)(A), "violent or sexual" includes all offenses against the person codified in § 5-10-101 et seq., § 5-11-101 et seq., § 5-12-101 et seq., § 5-13-201 et seq., § 5-13-301 et seq., and § 5-14-101 et seq., and any offense containing as an element of the offense the use of physical force, the threatened use of serious physical force, the infliction of physical harm, or the creation of a substantial risk of serious physical harm.

(iv) For the purpose of an expungement or a sealing of a record under § 16-93-1207, "target group" includes any misdemeanor conviction except a misdemeanor conviction for which the offender is required to register as a sex offender or a misdemeanor conviction for driving while intoxicated.

(B) Offenders and offenses falling within the target group population may access community correction facilities pursuant to § 16-93-1206 or § 16-93-1208;

(11) "Transfer" means an administrative condition permitting transfer of eligible offenders sentenced to traditional state correctional facilities to community correction facilities, programming, and community supervision, provided that only target offenders are eligible for the facilities;

(12)(A) "Transfer date" means the earliest date on which an offender is eligible for transfer from the Department of Correction to the Department of Community Correction.

(B) The date may be extended based on disciplinary behavior while under the custody of the Department of Correction; and

(13) "Trial court" means any court of this state having jurisdiction of an eligible offender and the power to sentence the eligible offender to the included options.

History. Acts 1993, No. 531, § 3; 1993, No. 548, § 3; 1995, No. 577, § 1; 1997, No. 279, § 1; 1997, No. 945, § 2; 2001, No. 1255, § 1; 2003, No. 245, § 1; 2003, No. 1018, § 1; 2005, No. 1994, § 287; 2007, No. 744, § 3.

Amendments. The 2007 amendment substituted "in subdivision (10)(A)(i) of this section" for "above" in (10)(A)(ii); substituted "subdivision" for "subsection" in (10)(A)(iii); and added (10)(A)(iv).

16-93-1206. [Repealed.]

Publisher's Notes. This section, concerning sentencing alternatives, was repealed by Acts 2011, No. 570, § 107. The section was derived from Acts 1993, No. 531, § 6; 1993, No. 548, § 6; 1995, No. 1170, § 1; 1999, No. 485, § 1; 2005, No. 1994, § 287.

16-93-1207. Order of court.

(a) Upon the sentencing or placing on probation of any person under the provisions of this subchapter, the sentencing court shall issue an order or commitment, whichever is appropriate, in writing, setting forth the following:

(1) That the offender is being:

(A) Committed to the Department of Correction;

(B) Committed to the Department of Correction with judicial transfer to the Department of Community Correction;

(C) Placed on suspended imposition of sentence;

(D) Placed on probation under the provisions of this subchapter; or

(E) Committed to a county jail for a misdemeanor offense committed after January 1, 2007;

(2) That the offender has knowledge and understanding of the consequences of the sentence or placement on probation and violations thereof;

(3) A designation of sentence or supervision length along with community correction program distinctions of that sentence or supervision length;

(4) Any applicable terms and conditions of the sentence or probation term; and

(5) Presentence investigation or sentencing information, including, but not limited to, criminal history elements and other appropriate or necessary information for correctional use.

(b)(1) Upon the successful completion of probation or a commitment to the Department of Correction with judicial transfer to the Department of Community Correction or a commitment to a county jail for one (1) of the offenses targeted by the General Assembly for community correction placement, the court may direct that the record of the offender be expunged of the offense of which the offender was either convicted or placed on probation under the condition that the offender has no more than one (1) previous felony conviction and that the previous felony was other than a conviction for:

(A) A capital offense;

(B) Murder in the first degree, § 5-10-102;

(C) Murder in the second degree, § 5-10-103;

(D) First degree rape, § 5-14-103;

(E) Kidnapping, § 5-11-102;

(F) Aggravated robbery, § 5-12-103; or

(G) Delivering controlled substances to a minor as prohibited in § 5-64-410 [repealed].

(2) The fact that a prior felony conviction has been previously expunged shall not prevent its counting as a prior conviction for the purposes of this subsection.

(3) The procedure, effect, and definition of "expungement" for the purposes of this subsection shall be in accordance with that established in § 16-90-901 et seq.

History. Acts 1993, No. 531, § 7; 1993, No. 548, § 7; 1995, No. 998, § 10; 2005, No. 1994, § 477; 2007, No. 744, § 4.

Amendments. The 2007 amendment added (a)(1)(E) and made a related change; inserted "or a commitment to a county jail" in (b)(1); and substituted "5-64-410" for "5-64-701(a)(2) [repealed]" in (b)(1)(G)."

16-93-1208. Post commitment transfer.

RESEARCH REFERENCES

Ark. L. Rev. Note, Hurricane Blakely and the Calm After the Storm Found in Booker, 58 Ark. L. Rev. 449.

Subchapter 13 — Criteria for Transfer to Community Punishment Programs

SECTION.

16-93-1301 — 16-93-1304. [Repealed.]

16-93-1301 — 16-93-1304. [Repealed.]

Publisher's Notes. This subchapter, concerning criteria for transfer to community punishment programs, was repealed by Acts 2011, No. 570, § 108. The subchapter was derived from the following sources:

16-93-1301. Acts 1993, No. 534, § 1; 1993, No. 555, § 1; 1994 (1st Ex. Sess.), No. 8, § 2; 1994 (1st Ex. Sess.), No. 9, § 2; 1994 (2nd Ex. Sess.), No. 19, § 1; 1995, No. 1170, § 3; 1997, No. 945, § 3; 2001, No. 904, § 1; 2005, No. 1994, § 478; 2007, No. 592, § 1.

16-93-1302. Acts 1993, No. 534, § 2; 1993, No. 555, § 2; 1995, No. 1009, § 2; 1995, No. 1011, § 2; 2005, No. 1994, § 289.

16-93-1303. Acts 1993, No. 534, § 3; 1993, No. 555, § 3.

16-93-1304. Acts 1993, No. 534, § 4; 1993, No. 555, § 4; 1995, No. 1170, § 4.

The amendment by Acts 2011, No. 180, § 1, to § 16-93-1302(f) was superseded by the repeal by Acts 2011, No. 570, § 108. This section would read as follows:

"16-93-1302. **Transfer procedures.**

"(a)(1)(A) Inmates under sentence for all felonies except those listed in subsection (b) of this section will be transferred from the Department of Correction to the Department of Community Correction subject to rules and regulations promulgated by the Board of Corrections and conditions set by the Parole Board.

"(B) This review may be conducted without a hearing when the inmate has not received a major disciplinary report against him or her which resulted in the loss of good time, there has not been a request by a victim to have input on transfer conditions, and there is no indication in the risk/needs assessment review that special conditions need to be placed on the inmate.

"(2)(A) When one (1) or more of the circumstances in subdivision (a)(1) of this section are present, the Parole Board shall conduct a hearing to determine the appropriateness of the inmate for transfer.

"(B) The Parole Board has two (2) options:

"(i) To transfer the individual to the Department of Community Correction accompanied by conditions of the transfer, including, but not limited to, supervision levels, programming requirements, and facility placement when appropriate; or

"(ii) To deny transfer based on a set of established criteria and to accompany the denial with a course of action to be undertaken by the inmate to rectify the Parole Board concerns.

"(C) Upon completion of the course of action determined by the Parole Board, after final review of the inmate's file to ensure successful completion, the Parole Board shall authorize the inmate's transfer to the Department of Community Correction in accordance with administrative policies and procedures governing the transfer and subject to conditions attached to the transfer.

"(3) Should an inmate fail to fulfill the course of action outlined by the Parole Board to facilitate transfer to community correction, it shall be the responsibility of the inmate to petition the Parole Board for rehearing.

"(b)(1) Inmates under sentence for the following Class Y felonies shall be eligible for discretionary transfer to the Department of Community Correction by the Parole Board after having served the time required as set by the Arkansas Sentencing Commission with credit for meritorious good time:

"(A) Murder in the first degree, § 5-10-102;

"(B) Kidnapping, § 5-11-102;

"(C) Rape, § 5-14-103;

"(D) Aggravated robbery, § 5-12-103;

"(E) Causing a catastrophe, § 5-38-202(a);

"(F) Engaging in a continuing criminal enterprise, § 5-64-405; and

"(G) The manufacture or delivery of a schedule I or schedule II controlled substance which by aggregate weight including adulterants or diluents is greater than twenty-eight grams (28 g), § 5-64-401(a)(1).

"(2)(A) Review of inmates convicted of the enumerated offenses in subdivision (b)(1) of this section shall be based upon policies and procedures adopted by the Parole Board for the review.

"(B) The policies and procedures shall include provision for notification of victims, that a hearing shall be held and records kept of such proceedings, and that

there be a listing of the criteria upon which a denial may be based.

"(3) All transfers of offenders specified in this subsection shall be issued upon order, duly adopted, of the Parole Board in accord with such policies and procedures.

"(c)(1) The course of action required by the Parole Board shall not be outside the current resources of the Department of Correction nor the conditions set be outside the current resources of the Department of Community Correction.

"(2) However, the departments shall strive to accommodate the actions required by the Board of Corrections to the best of their ability.

"(d) Transfer is not an award of clemency and it shall not be considered as a reduction of sentence or a pardon.

"(e) Every inmate while on transfer status shall remain in the legal custody of the Department of Correction, under the supervision of the Department of Community Correction, and subject to the orders of the Parole Board.

"(f) An inmate who has met all of the criteria for release and who has a release eligibility date that falls on a weekend or holiday may be released on the last business day before his or her release eligibility date.

"(g) An inmate who is sentenced under the provisions 28 of § 5-4-501(c) or (d) for a serious violent felony or a felony involving violence may be considered eligible for parole or for community correction transfer upon reaching regular parole or transfer eligibility, but only after reaching a minimum age of fifty-five (55) years.

"History. Acts 1993, No. 534, § 2; 1993, No. 555, § 2; 1995, No. 1009, § 2; 1995, No. 1011, § 2; 2005, No. 1994, § 289."

Subchapter 15 — Parole — Sentence Served in County Jail

SECTION.
16-93-1501, 16-93-1502. [Repealed.]

16-93-1501, 16-93-1502. [Repealed.]

Publisher's Notes. This subchapter, concerning parole — sentence served in county jail, was repealed by Acts 2011, No. 570, § 109. The subchapter was derived from the following sources:

16-93-1501. Acts 2003, No. 1394, § 1.
16-93-1502. Acts 2003, No. 1394, § 2.

Subchapter 16 — Transitional Housing Facilities

SECTION.
16-93-1603. Powers and duties of the Board of Corrections.
16-93-1604. Powers and duties of the Department of Community Correction.

SECTION.
16-93-1605. License required.

A.C.R.C. Notes. Acts 2007, No. 1286, § 15, provided: "TRANSITIONAL HOUSING PROGRAM FUNDING REQUIREMENTS. A minimum of one million five hundred thousand ($1,500,000) dollars each fiscal year shall be expended for Transitional Housing costs associated with inmate and/or parolee placement. In the event that a minimum of one million five hundred thousand ($1,500,000) dollars can not be expended each fiscal year for Transitional Housing Program costs, the Director of the Department of Community Correction shall notify and seek approval by the Arkansas Legislative Council or Joint Budget Committee."

16-93-1603. Powers and duties of the Board of Corrections.

(a) The Board of Corrections shall promulgate rules that shall set minimum standards for all transitional housing facilities in the State of Arkansas.

(b)(1) The Parole Board, a district court, or a circuit court shall not release a transferee, parolee, or probationer to a transitional housing facility as a resident unless the transitional housing facility provides a copy of a current license issued by the Department of Community Correction under § 16-93-1604.

(2) The transitional housing facility shall comply with all the standards set by the rules established by the Board of Corrections under subsection (a) of this section.

(c) The rules described in subsection (a) of this section shall include at least the following:

(1) Compliance with any local health and safety codes, including housing codes, fire codes, plumbing codes, and electrical codes, set by the jurisdiction or jurisdictions in which the transitional housing facility is located;

(2) Compliance with any local zoning ordinances;

(3) Compliance with any state and federal health and safety codes;

(4) Consideration of geographic dispersement of transitional housing facilities;

(5) Allowable ratio of transitional housing facility square footage to residents; and

(6) Allowable ratio of bathing facilities and restroom facilities to residents.

(d)(1) The rules described in subsection (a) of this section shall be promulgated on or before January 1, 2006.

(2) The Board of Corrections may make additions, amendments, changes, or alterations to the rules in accordance with the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

History. Acts 2005, No. 1378, § 2; 2009, No. 615, § 1.

Amendments. The 2009 amendment rewrote (b), which read: "All of the standards set by the rules described in subsection (a) of this section shall be established prior to the Parole Board's or a district or circuit court's releasing a transferee, parolee, or probationer to a transitional housing facility as a resident."

16-93-1604. Powers and duties of the Department of Community Correction.

(a) The Department of Community Correction shall implement the rules described in § 16-93-1603 on or before July 1, 2006.

(b)(1) The department shall be responsible for the enforcement of the rules established by the Board of Corrections under § 16-93-1603.

(2) The department shall establish all procedures and forms that it deems necessary to implement the rules, and the procedures shall include, but not be limited to, the following:

(A) Creating a state-issued Arkansas transitional housing facility license for applicant facilities that have met the standards established by the rules of the board;

(B) Establishing the process to be followed by an applicant in making application to the department to receive a license to operate an approved transitional housing facility, which shall include a reasonable application fee to be established by the board;

(C) Establishing procedures for the department to accept applications for facilities wishing to obtain a license to operate a transitional housing facility and to investigate whether applicants meet the standards established by the rules of the board;

(D)(i) Establishing procedures for the department to notify an applicant when its application has been approved or denied.

(ii) All denials shall specify in writing the reason for the application's denial;

(E) Establishing procedures to investigate complaints that a licensed transitional housing facility is in violation of the standards established by the rules of the board;

(F) Establishing procedures for the department to suspend or revoke a license when a license holder is no longer in compliance with or violates the rules of the board; and

(G) Establishing procedures for the department to impose civil penalties for the operation of a transitional housing facility without a valid license issued by the department.

(c) The Director of the Department of Community Correction and the staff of the department shall provide administrative support to the board.

History. Acts 2005, No. 1378, § 2; 2009, No. 615, § 2.

Amendments. The 2009 amendment inserted (b)(2)(G) and made related changes.

16-93-1605. License required.

(a) In order to operate a transitional housing facility for criminal offenders who have been transferred, paroled, or placed on probation through the Arkansas criminal justice system, the operator shall obtain a license from the Department of Community Correction.

(b)(1) Operation of a transitional housing facility without a license issued by the department shall result in the imposition of civil penalties against the operator by the department.

(2) Civil penalties for operation of a transitional housing facility without a valid license shall not exceed five hundred dollars ($500) per day for each day the violation continues.

(3) However, no civil penalty may be assessed until the person charged with the violation has been given the opportunity for a hearing on the violation.

(c) A criminal offender who has been transferred, paroled, or placed on probation through the Arkansas criminal justice system shall not be

sent via court order to a transitional housing facility that is not properly licensed by the department.

History. Acts 2009, No. 615, § 3.

Subchapter 17 — Swift and Certain Accountability on Probation Pilot Program

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A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

16-93-1701. Establishment.

The Administrative Office of the Courts shall:

(1) Create the Swift and Certain Accountability on Probation Pilot Program, awarding up to five (5) grants in the program's first year to counties or judicial districts requesting funds to establish probation programs to be administered by the Department of Community Correction designed to reduce recidivism by requiring swift, certain, and graduated sanctions for probationers in noncompliance;

(2) Possess the discretion to determine the appropriate number of grants based on the amount of money allocated for the grant program and the capacity of the applicants based on submitted proposals to successfully implement and evaluate the program;

(3) Ensure that grants awarded under this subchapter are awarded in a manner that promotes the strongest proposals and evaluation designs that have the broadest impact and that are evenly geographically distributed; and

(4) Employ a person who shall have as one-half (½) of his or her designated job duties the management of the program established under this subchapter.

History. Acts 2011, No. 570, § 110.

16-93-1702. Application.

(a) A county or judicial district may apply for a grant award under this subchapter by submitting a written application to the Administrative Office of the Courts.

(b) The application shall include the following:

(1) A description of the proposed probation program and the need in the county or judicial district for the establishment of a probation program under this subchapter;

(2) A description of the long-term strategy and a detailed plan of implementation, including how the county or judicial district intends to pay for the probation program after the grant funding is exhausted;

(3) A certification that all government or private entities that would be affected by the proposed probation program have been appropriately consulted regarding the development of the probation program;

(4) A description of the coordination plan involving all government or private entities in the implementation process;

(5) Identification of the governmental and judicial partners in the proposed probation program, including the chief judge of the circuit court as well as other participating judges in the applicable jurisdiction, the court administrator, the probation administrator, the county sheriff, the prosecuting attorney, the public defender, applicable private defense attorneys, applicable municipal law enforcement administrators, and applicable treatment provider administrators; and

(6) A description of how and assurances that the applicant will collect key process measures, including the:

(A) Number of probationers enrolled in the probation program;

(B) Frequency of drug testing probationers;

(C) Positive drug test rate and other rates of noncompliance with the measurable conditions of supervision;

(D) Kinds of sanctions available for a violation of probation;

(E) Kinds of rewards available for positive behavior;

(F) Certainty of the application of an appropriate sanction;

(G) Average period of time from detection of a violation to issuance of a sanction for the violation;

(H) Severity of the sanction; and

(I) Time between the completion of the sanction and a subsequent violation, if any.

History. Acts 2011, No. 570, § 110.

16-93-1703. Grant uses.

(a) A grant awarded under this subchapter shall be used by the grantee to establish probation programs that:

(1) Identify probationers for enrollment in the probation program, through, among other tools, a validated risk-needs assessment tool, who are:

(A) Serving a term of probation;

(B) At high risk of failing to observe the conditions of supervision; and

(C) At high risk of being returned to incarceration as a result of that failure;

(2) Notify probationers of the rules of the probation program, and consequences for violating those rules;

(3) Monitor probationers for illicit drug use with regular and rapid-result drug screening;

(4) Monitor probationers for violations of other rules and probation terms, including failure to pay court-ordered financial obligations such as child support or victim restitution;

(5) Respond to violations of those rules with immediate arrest of the violating probationer and swift and certain modification of the conditions of probation, including imposition of short jail stays;

(6) Immediately respond to probationers who have absconded from supervision with service of bench warrants and immediate sanctions;

(7)(A) Provide rewards to probationers who comply with those rules.

(B) Rewards shall include without limitation:

(i) Reduced reporting requirements;

(ii) Less frequent drug testing;

(iii) Certificates of achievement;

(iv) Other rewards as determined by the locality; and

(v) Early termination of the sentence;

(8) Ensure funding for and referral to substance abuse treatment for probationers who repeatedly fail to refrain from illicit drug use;

(9) Establish procedures to terminate probation program participation by and initiate revocation to a term of incarceration for probationers who habitually fail to abide by probation program rules and pose a threat to public safety; and

(10) Include regular coordination meetings for key partners of the probation program, including the partners identified under § 16-93-1702(b)(5).

(b) As used in this section, "validated risk-needs assessment" means a determination of a person's risk to reoffend and the needs that, when addressed, reduce the risk to reoffend through the use of an actuarial assessment tool that assesses the dynamic and static factors that drive criminal behavior.

History. Acts 2011, No. 570, § 110.

16-93-1704. Determination of probation program savings.

(a) Each county or judicial district receiving a grant under this subchapter shall:

(1) Not later than twelve (12) months after an initial grant award under this section and annually thereafter through the end of the grant period calculate the amount of cost savings and costs averted, if any, resulting from the reduced incarceration achieved through the grant program; and

(2) Report to the Administrative Office of the Courts:

(A) The amount calculated under subdivision (a)(1) of this section; and

(B) The portion of the amount, if any, that will be reinvested for expansion of the Swift and Certain Accountability on Probation Pilot Program.

(b) The Administrative Office of the Courts shall:

(1) Annually evaluate:

(A) The methods used by courts to calculate the cost savings reported under subdivision (a)(1) of this section; and

(B) The use of the savings by the courts to reinvest for expansion of the Swift and Certain Accountability on Probation Pilot Program; and

(2) Provide guidance, assistance, and recommendations to such courts relating to the potential reinvestment of such savings for expansion of the Swift and Certain Accountability on Probation Pilot Program.

(c) The Administrative Office of the Courts shall select an entity to serve as the Swift and Certain Accountability on Probation Pilot Program initiative evaluation coordinator to:

(1) Analyze and provide feedback on the measures and outcomes the individual program initiative programs are required to collect and conduct, respectively, in accordance with § 16-93-1702(b)(6);

(2) Ensure consistent tracking of the progress of the demonstration programs carried out under this section, including such measures and outcomes; and

(3) Ensure that the aggregate data from all such programs is available to each of the programs and to the Administrative Office of the Courts.

(d) The Administrative Office of the Courts shall report annually to the General Assembly and the Governor the results of the Swift and Certain Accountability on Probation Pilot Program initiative carried out under this subchapter.

History. Acts 2011, No. 570, § 110.

CHAPTER 95

INTERSTATE AGREEMENT ON DETAINERS

16-95-101. Agreement on Detainers.

RESEARCH REFERENCES

ALR. Construction and Application of Article IV of Interstate Agreement on Detainers (IAD): Issues Related to "Speedy Trial" Requirement, and Construction of Essential Terms. 51 A.L.R.6th 1.

Construction and Application of Article IV of Interstate Agreement on Detainers (IAD): Issues Related to "Anti-Shuttling" Provision, Dismissal of Action Against Detainee, and Adequacy of Certificate. 52 A.L.R.6th 1.

Construction and Application of Article IV of Interstate Agreement on Detainers (IAD): Issues Related to Custody, Temporary Custody, Contest as to Legality of Custody, Necessity of Hearing, and Transmittal Orders. 53 A.L.R.6th 1.

CHAPTER 96

PROCEEDINGS IN INFERIOR COURTS

SUBCHAPTER.
4. Fines, Penalties, and Forfeitures.

Subchapter 4 — Fines, Penalties, and Forfeitures

SECTION.
16-96-403. Imposition by circuit court on appeal — Costs.

16-96-403. Imposition by circuit court on appeal — Costs.

The fines, penalties, forfeitures, and costs imposed by a circuit court for offenses which are misdemeanors or violations under state law or local ordinance or for traffic offenses which are misdemeanors or violations under state law or local ordinance in cases appealed from a court of limited jurisdiction shall be collected and disbursed in the following manner:

(1) If the appeal proceeds to a de novo bench trial or jury trial, the fines, penalties, forfeitures, and costs imposed by the circuit court shall be collected under § 16-13-709 and paid to the county treasurer;

(2)(A) If the defendant pleads guilty or nolo contendere or the circuit court dismisses the appeal, including dismissals under Arkansas Rules of Criminal Procedure 36(h), the judgment of the court from which the appeal originated shall be affirmed.

(B)(i) The circuit court clerk shall notify in writing, within thirty (30) days of the affirmance or dismissal, the court from which the appeal originated of the affirmance or dismissal and shall return any bond or other security which has been transmitted to the circuit court.

(ii) Upon receipt of the notice of affirmance or dismissal and the bond or other security, the court from which the appeal originated shall collect and disburse the fines, penalties, forfeitures, and costs under §§ 16-10-209, 16-10-308, 16-17-707, 14-44-108, and 14-45-106; and

(3) Nothing in this section shall affect the right of a court of limited jurisdiction to require the defendant to post a bond or other security to guarantee the appearance of the defendant before the circuit court nor the ability of these courts to collect any fine, penalty, forfeiture, or costs imposed in the absence of the bond or other security.

History. Acts 1933, No. 148, § 1; Pope's Dig., § 11826; A.S.A. 1947, § 44-410; Acts 1995, No. 1252, § 1; 1997, No. 788, § 24; 1997, No. 1341, § 24; 1999, No. 1081, § 9; 2003, No. 1185, § 220; 2003, No. 1765, § 25; 2009, No. 633, § 17.

Amendments. The 2009 amendment subdivided (2), inserted "including dismissals under Arkansas Rules of Criminal Procedure 36(h)" in (2)(A), inserted "and shall return any bond or other security which has been transmitted to the circuit court" in (2)(B)(i), and inserted "and the bond or other security" in (2)(B)(ii); in (3),

substituted "the defendant to post a bond or other security to guarantee the appearance of the defendant before the" for "a supersedeas bond for an appeal to" and substituted "the bond or other security" for "a supersedeas bond"; and made related and minor stylistic changes.

Subchapter 5 — Appeals to Circuit Court

16-96-508. Judgment on default.

CASE NOTES

Dismissal Improper.

Dismissal of defendant's appeal of his conviction in the city court was improper as this section did not apply where defendant only failed to show up to a pre-trial hearing, and the dismissal would waive defendant's right to a jury trial, which he did not waive. Ayala v. State, 365 Ark. 192, 226 S.W.3d 766 (2006).

Circuit court abused its discretion in dismissing defendant's appeal pursuant to this section where it based the dismissal on his initial failure to appear, recalled the case the same day, defendant was present when the case was recalled, and the court indicated that it was having a trial that same day. Lampkin v. State, 101 Ark. App. 275, 275 S.W.3d 679 (2008).

CHAPTER 97
SENTENCING

16-97-101. Bifurcated sentencing procedures.

CASE NOTES

Analysis

Alternative Sentences.
Error Not Found.
Sentencing by Trial Court.

Alternative Sentences.

Trial court abused its discretion when it failed to allow a jury to consider alternative punishment after it convicted defendant of sexual assault in the first degree, rather than rape. Miller v. State, 97 Ark. App. 285, 248 S.W.3d 487 (2007).

Trial court did not abuse its discretion when if refused to give defendant's requested instruction on the alternative sentence of probation because the decision on jury instructions was within the scope of the trial court and had such an instruction been given it was unlikely that the jury would have recommended probation, as it recommended consecutive twenty-five year terms, event though the minimum term was ten years. Benjamin v. State, 102 Ark. App. 309, 285 S.W.3d 264 (2008), review denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 561 (Oct. 23, 2008).

Because the permissive language of subdivision (4) of this section did not require a trial court to give an instruction on alternative sentencing, the trial court committed no error in declining defendant's request for an instruction recommending probation; even if the jury was so instructed, the trial court had the discretion to reject the jury's recommendation for probation, and the trial court did not believe that an alternative sentence was appropriate under the facts of the case. Stigger v. State, 2009 Ark. App. 596, — S.W.3d — (2009).

Error Not Found.

While a trial court was authorized to instruct the jury on alternative sentences for which defendant might have qualified under subdivision (4) of this section, the statute was permissive and did not require the trial court to give such an instruction. The trial court's reasons for not offering the instruction based on the facts of defendant's case did not amount to an

abuse of discretion. Suggs v. State, 2010 Ark. App. 571, — S.W.3d — (2010).

Sentencing by Trial Court.

In a case dealing with domestic offenses, although the jury was permitted to recommend an alternative sentence, the trial court had the discretion as to whether to impose it; thus, the trial court was permitted to accept a jury's recommended alternative sentences of probation and suspended sentences and then impose fines as a condition of those sentences, pursuant to § 5-4-303(c)(10). Sullivan v. State, 366 Ark. 183, 234 S.W.3d 285 (2006).

Trial court imposed an illegal sentence when it rejected a jury's verdict and took it upon itself to sentence defendant where the jury's sentencing verdict of zero years in prison and a fine of zero dollars was a proper and valid sentence for second-degree battery; the appellate court sentenced defendant to three years of probation in accordance with the jury's alternative verdict under Ark. Code Ann. § 16-97-101(4). Donaldson v. State, 370 Ark. 3, 257 S.W.3d 74 (2007).

Cited: Polivka v. State, 2010 Ark. 152, — S.W.3d — (2010).

16-97-102. Sentencing by the court.

CASE NOTES

Cited: Epps v. State, 100 Ark. App. 344, 268 S.W.3d 362 (2007).

16-97-103. Evidence.

CASE NOTES

Analysis

Admissibility.
Aggravating Circumstances.
Victim Impact Evidence.

Admissibility.

Trial court did not err by allowing two witnesses to testify during sentencing that they had seen defendant "acting suspiciously" in the neighborhood park on the day of his initial contact with police because the trial court specifically instructed the jury that the testimony was only to be considered to show why the witnesses called the police and was not offered for the truth of the matter asserted, the testimony was not unduly prejudicial, and the testimony went to defendant's character. Adkins v. State, 371 Ark. 159, 264 S.W.3d 523 (2007).

Trial court did not err by allowing a police officer to testify that defendant's pants were unbuttoned and unzipped at the time of his arrest because defendant cured any prejudice by cross-examining the officer and the appearance of defendant's clothing was relevant to why the officer searched defendant. Adkins v. State, 371 Ark. 159, 264 S.W.3d 523 (2007).

Trial court's decision to permit the introduction of evidence relating to defendant's criminal history during the sentencing phase of his trial was consistent with the mandates of this section; at sentencing, under § 5-4-401(a)(1), defendant was subjected to the normal ranges of Class A and Y felonies as opposed to the enhanced ranges designated for habitual offenders. Defendant actually received the minimum sentences allowed on two of his four convictions and less than the maximum on the other two and, under § 5-4-403, his sentences were ordered to run concurrently rather than consecutively, as they could have; thus, defendant not only failed to establish a threshold evidentiary error supporting reversal, but he also failed to show that he suffered prejudice during sentencing. Wilson v. State, 100 Ark. App. 14, 262 S.W.3d 628 (2007).

Aggravating Circumstances.

During the penalty phase of defendant's trial for driving while intoxicated in violation of § 5-65-103 and refusal to submit to a chemical test in violation of § 5-65-205,

the trial court did not err by admitting evidence of his prior convictions for refusal to submit to a chemical test; the evidence was admissible under this section, as it was relevant to his sentencing as either character evidence or aggravating circumstances. Williams v. State, 2009 Ark. App. 554, — S.W.3d — (2009), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 732 (Oct. 29, 2009).

Victim Impact Evidence.

As to the state's appeal regarding the defense's use of victim-impact evidence under this section, there was jurisdiction over the appeal because the application of statutory sentencing procedures required uniformity and consistency. However, the state's argument was not addressed because it was not preserved for review; the state's contemporaneous relevance objection did not encompass the arguments made on appeal. Jones v. State, 374 Ark. 475, 288 S.W.3d 633 (2008).

Cited: MacKool v. State, 365 Ark. 416, 231 S.W.3d 676 (2006); Bell v. State, 371 Ark. 375, 266 S.W.3d 696 (2007).

CHAPTER 98

TREATMENT FOR DRUG ABUSE

SUBCHAPTER.

3. Arkansas Drug Court Act.

Subchapter 2 — Pretrial or Posttrial Treatment, Intervention, and Diversion Programs

16-98-201. Qualifications — Waiver.

CASE NOTES

Analysis

Illustrative Cases.
Probation Revocation.

Illustrative Cases.

Where appellant did not complete drug court in accordance with § 16-98-201, he was required to serve a six-year sentence for forgery and a ten-year suspended sentence for theft. Under § 5-4-404, he was entitled to 53 days credit for the time he spent in jail before he entered drug court; appellant was not entitled to credit for the time that his case was in drug court. Laxton v. State, 99 Ark. App. 1, 256 S.W.3d 518 (2007).

Probation Revocation.

Where defendant pleaded guilty to commercial burglary, breaking or entering, two counts of theft of property, and first-degree criminal mischief, he was sentenced to 60 months' supervised probation. Because defendant consented to going to the residential drug treatment in accordance with this section, his placement in a regional punishment facility could not be classified as a probation revocation; when he violated the terms of the drug-court program based on his public intoxication and testing positive for cocaine, the trial court did not err by revoking his probation. Doyle v. State, 2009 Ark. App. 94, 302 S.W.3d 607 (2009).

Subchapter 3 — Arkansas Drug Court Act

SECTION.

16-98-301. Short title and definitions.
16-98-302. Purpose and intent.
16-98-303. Drug court programs authorized.
16-98-304. Cost and fees.
16-98-305. Required resources.
16-98-306. Collection of data.
16-98-307. Drug Court Advisory Committee — Creation.

Effective Dates. Acts 2007, No. 1022, § 6: Apr. 4, 2007. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that there is a critical need for judicial intervention and support for effective treatment programs that reduce the incidence of drug use, drug addiction, and family separation due to parental substance abuse and drug-related crimes; that this act expands drug court programs and creates the Drug Court Advisory Committee; and that this act is immediately necessary because any delay in the expansion of drug court programs or the creation of the Drug Court Advisory Committee will harm citizens of this state who will benefit from judicial monitoring of intensive treatment and strict supervision of addicts in drug and drug-related cases. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2011, No. 5, § 2: Jan. 31, 2011. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the Drug Court Advisory Committee provides valuable advice and review on issues involving drug courts; that the committee is missing the perspective of the Parole Board in this advice and review and that the addition of the Chair of the Parole Board or his or her designee will enhance the committee's performance of its duties; and that the new member added by this act should assume that position as soon as possible to allow the committee to perform its duties in an effective manner. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is 28 overridden, the date the last house overrides the veto."

CASE NOTES

Revocation.

Defendant's drug-court probation under §§ 16-98-301 to 16-98-304 was revoked for failing to attend drug testing, failing to attend a group meeting, and being arrested because she inexcusably failed to comply under § 5-4-309(d), despite a delirium diagnosis. Defendant did not show that she was suffering from such on the dates that probation was violated; moreover, an examination showed no mental defect, and her hallucinations were not involved with her probation revocation. Anglin v. State, 98 Ark. App. 34, 249 S.W.3d 836 (2007).

After defendant's drug-court probation was revoked, her argument that she was ineligible due to a mental health issue was not considered on review because it was not raised to the trial court. Anglin v. State, 98 Ark. App. 34, 249 S.W.3d 836 (2007).

16-98-301. Short title and definitions.

(a) This subchapter shall be known as the "Arkansas Drug Court Act".

(b) As used in this subchapter:

(1) "Evidence-based practices" means practices proven through research to reduce recidivism;

(2) "Validated risk-needs assessment" means a determination of a person's risk to reoffend and the needs that, when addressed, reduce

the risk to reoffend through the use of an actuarial assessment tool that assesses the dynamic and static factors that drive criminal behavior; and

(3) "Violent felony offense" means an offense that is punishable by a term of imprisonment exceeding one (1) year, and during the course of the offense:

(A)(i) The person carried, possessed, or used a firearm or other dangerous weapon; and

(ii) The use of deadly force was used against another person; or

(B) Death or serious physical injury was inflicted upon another person, regardless of whether death or serious physical injury was an element of the crime for which the person was convicted.

History. Acts 2003, No. 1266, § 1; 2011, No. 570, § 111.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment added "and definitions" in the section heading; and added the (a) designation and (b).

CASE NOTES

Probation Revocation.

Trial court lacked authority, pursuant to § 5-4-303(d)(2), to lengthen defendant's probationary period where defendant had made progress in the drug-court program under the Drug Court Act (§ 16-98-301 et seq.), because the trial court did not hold a revocation hearing pursuant to § 5-4-310. Cross v. State, 2009 Ark. 597, — S.W.3d — (2009).

16-98-302. Purpose and intent.

(a) There is a critical need for judicial intervention and support for effective treatment programs that reduce the incidence of drug use, drug addiction, and family separation due to parental substance abuse and drug-related crimes. It is the intent of the General Assembly for this subchapter to enhance public safety by facilitating the creation, expansion, and coordination of drug court programs.

(b) The goals of the drug court programs in this state shall be consistent with the standards adopted by the United States Department of Justice and recommended by the National Association of Drug Court Professionals and shall include the following key components:

(1) Integration of substance abuse treatment with justice system case processing;

(2) Use of a nonadversarial approach in which prosecution and defense promote public safety while protecting the right of the accused to due process;

(3) Early identification, with the use of a validated risk-needs assessement, of eligible moderate-to-high-risk participants and prompt placement of eligible participants;

(4) Access to a continuum of treatment, rehabilitation, and related services;

(5) Frequent testing for alcohol and illicit drugs;

(6) A coordinated strategy among the judge, prosecution, defense, and treatment providers to govern offender compliance;

(7) Ongoing judicial interaction with each participant;

(8) Monitoring and evaluation of the achievement of program goals and effectiveness;

(9) Continuing interdisciplinary education to promote effective planning, implementation, and operation; and

(10) Development of partnerships with public agencies and community-based organizations to generate local support and enhance drug court effectiveness.

(c)(1) Drug court programs are specialized court dockets within the existing structure of the Arkansas court system. Drug court programs offer judicial monitoring of intensive treatment and strict supervision of addicts in drug and drug-related cases.

(2) The creation of a drug court docket and the appointment of a circuit judge to that docket shall be approved by the administrative judge in each judicial circuit and made a part of the judicial circuit's administrative plan required by Supreme Court Administrative Order Number 14.

(d) Drug court program success shall be determined by the rate of recidivism of all drug court participants, including participants who do not graduate.

History. Acts 2003, No. 1266, § 2; 2007, No. 1022, § 3; 2011, No. 570, § 112.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2007 amendment rewrote the section.

The 2011 amendment, in (b)(3), inserted "with the use of a validated risk-needs assessment" and "moderate-to-high-risk"; and added (d).

16-98-303. Drug court programs authorized.

(a)(1) Each judicial district of this state is authorized to establish a drug court program under this subchapter.

(2)(A) The structure, method, and operation of each drug court program may differ and should be based upon the specific needs of and resources available to the judicial district where the drug court program is located.

(B)(i) A drug court program may be preadjudication or postadjudication for an adult offender.

(ii) A juvenile drug court program or services may be used in a delinquency case or a family in need of services case pursuant to a diversion agreement under § 9-27-323.

(iii) A juvenile drug court program or services may be used in a dependency-neglect case under § 9-27-334.

(3) Notwithstanding the authorization described in subdivision (a)(1) of this section, no judge of a circuit court, drug court, or juvenile court may order any services or treatment under subsection (b) of this section or § 16-98-305 unless:

(A) An administrative and programmatic appropriation has been made for those purposes;

(B) Administrative and programmatic funding is available for those purposes; and

(C) Administrative and programmatic positions have been authorized for those purposes.

(b)(1) A drug court program shall incorporate services from the Department of Community Correction, the Department of Human Services, and the Administrative Office of the Courts.

(2) Subject to an appropriation, funding, and position authorization, both programmatic and administrative, the Department of Community Correction shall:

(A) Provide positions for persons to serve as probation officers, drug counselors, and administrative assistants;

(B) Provide for drug testing for drug court program participants;

(C) Provide for intensive outpatient treatment for drug court program participants;

(D) Provide for intensive short-term and long-term residential treatment for drug court program participants; and

(E) Develop clinical assessment capacity, including drug testing, to identify participants with a substance addiction and develop a treatment protocol that improves the person's likelihood of success.

(3) Subject to an appropriation, funding, and position authorization, both programmatic and administrative, the Department of Human Services shall:

(A) Provide positions for persons to serve as drug counselors and administrative assistants in delinquency cases, dependency-neglect cases, and family in need of services cases;

(B) Provide for drug testing for drug court program participants in delinquency cases, dependency-neglect cases, and family in need of services cases;

(C) Provide for intensive outpatient treatment for drug court program participants in delinquency cases, dependency-neglect cases, and family in need of services cases;

(D) Provide for intensive short-term and long-term residential treatment for drug court program participants in delinquency cases, dependency-neglect cases, and family in need of services cases;

(E) Certify and license treatment providers and treatment facilities that serve drug court program participants;

(F) Provide and oversee residential beds for drug court programs;

(G) Oversee catchment area facilities for drug court programs;

(H) Act as a liaison between the courts and drug court program participants; and

(I) Oversee performance standards for residential and long-term facilities providing services to drug court programs.

(4) Subject to an appropriation, funding, and position authorization, both programmatic and administrative, the Administrative Office of the Courts shall:

(A) Provide state-level coordination and support for drug court judges and their programs;

(B) Administer funds for the maintenance and operation of local drug court programs;

(C) Provide training and education to drug court judges and other professionals involved in drug court programs;

(D) Operate as a liaison between drug court judges and other state-level agencies providing services to drug court programs;

(E) Develop criteria for determining new drug court locations that take into account:

(i) The current size of the defendant population that meets the criteria for drug court participation;

(ii) Recent trends indicating an increasing defendant population that meets the criteria for drug court participation;

(iii) Existing drug treatment programs currently in place and operating through the courts, the county jail, or the Department of Correction; and

(iv) The drug court program's use of evidence-based practices by key partners involved in the prospective drug court including those to assess the needs of drug court participants in order to effectively target programming toward high-risk participants.

(c)(1) A drug court program shall not be available to any defendant who:

(A) Has a pending charge for a violent felony against him or her; or

(B) Has been convicted of a violent felony offense as defined in this subchapter or adjudicated delinquent as a juvenile of a violent felony offense; or

(C)(i) Is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq.

(ii) The exclusion under subdivision (c)(1)(C)(i) of this section shall not apply to the offense of prostitution, § 5-70-102.

(2) Eligible offenses may be further restricted by the rules of a specific drug court program.

(3) Nothing in this subchapter shall require a drug court judge to consider or accept every offender with a treatable condition or addiction, regardless of the fact that the controlling offense is eligible for consideration in the program.

(4) Any defendant who is denied entry to a drug court program shall be prosecuted as provided by law.

(d)(1) Drug court programs may require a separate judicial processing system differing in practice and design from the traditional adversarial criminal prosecution and trial systems.

(2) A drug court team shall be designated by a circuit judge assigned to manage the drug court docket and may include a circuit judge, a prosecuting attorney, a public defender or private defense attorney, one (1) or more addiction counselors, one (1) or more probation officers, one (1) or more private treatment provider representatives, and any other individual or individuals determined necessary by the drug court judge.

(3)(A) The administrative judge of the judicial district shall designate one (1) or more circuit judges to administer the drug court program.

(B) If a county is in a judicial district that does not have a circuit judge who is able to administer the drug court program on a consistent basis, the administrative plan for the judicial circuit required by Administrative Order No. 14 of the Supreme Court may designate a district court judge to administer the drug court program.

(e) Each judicial district may develop a training and implementation manual for drug court programs with the assistance of the:

(1) Department of Human Services;

(2) Department of Education;

(3) Department of Career Education;

(4) Department of Community Correction; and

(5) Administrative Office of the Courts.

(f) A Division of Drug Court Programs is created within the Administrative Office of the Courts. The position of Drug Court Coordinator is created within the Division of Drug Court Programs, and the Drug Court Coordinator shall:

(1) Provide assistance, counsel, and advice to the Drug Court Advisory Committee;

(2) Serve as a coordinator between drug court judges, the Department of Community Correction, the Office of Alcohol and Drug Abuse Prevention, private treatment provider representatives, and public health advocates;

(3) Establish, manage, and maintain a uniform statewide drug court information system to track information and data on drug court program participants to be reviewed by the Drug Court Advisory Committee;

(4) Train and educate drug court judges and drug court staff in those judicial districts maintaining a drug court program;

(5) Provide staff assistance to the Arkansas Association of Drug Court Professionals;

(6) Oversee the disbursement of funds appropriated to the Administrative Office of the Courts for the maintenance and operation of local drug court programs based on a formula developed by the Administrative Office of the Courts and reviewed by the Drug Court Advisory Committee; and

(7) Develop guidelines to be reviewed by the Drug Court Advisory Committee to serve as a framework for developing effective local drug court programs and to provide a structure for conducting research and evaluation for drug court program accountability.

(g)(1) A drug court judge, on his or her own motion or upon a request from an offender, may order expungement and dismissal of a case if:

(A) The offender has successfully completed a drug court program, as determined by the drug court judge;

(B) The offender has received aftercare programming;

(C) The drug court judge has received a recommendation from the prosecuting attorney for expungement and dismissal of the case; and

(D) The drug court judge, after considering the offender's past criminal history, feels expungement and dismissal of the case is appropriate.

(2)(A) Except as provided in subdivision (g)(2)(B) of this section, if the offender has plead guilty or nolo contendere to or has been found guilty of an offense falling within a target group under § 16-93-1202(10)(A)(i) in another Arkansas court, the drug court judge may order expungement and dismissal of the offense falling within a target group with the written concurrence of the other Arkansas court.

(B) The following offenses shall not be eligible for expungement under subdivision (g)(2)(A) of this section:

(i) Residential burglary, § 5-39-201(a);

(ii) Commercial burglary, § 5-39-201(b);

(iii) Breaking or entering, § 5-39-202; and

(iv) The fourth and subsequent offense of driving while intoxicated, § 5-65-103.

(3) Unless otherwise ordered by the drug court, expungement under this subsection shall be as described in § 16-90-901 et seq.

History. Acts 2003, No. 1266, § 3; 2007, No. 1022, § 4; 2009, No. 1491, § 2; 2011, No. 570, §§ 113–115; 2011, No. 1137, § 3.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Acts 2011, No. 1137, § 1, provided: "Legislative findings.

"(a) In a per curiam opinion dated February 9, 2011, the Supreme Court addressed the recommendations of the District Court Resource Assessment Board, one (1) of which stated that the General Assembly could authorize a state district court judge to preside over a drug court program, probation revocation proceeding, or a parole revocation proceeding. In Re Amendments to Administrative Order Nos. 4 and 18 and Regulations of the Arkansas Board of Certified Court Reporter Examiners § 1, 2011 Ark. 57 (2011).

"(b) That the General Assembly finds that allowing a state district court judge to preside over a drug court, a probation revocation proceeding, or a parole revocation proceeding promotes the sound and efficient administration of justice."

Amendments. The 2007 amendment rewrote the section.

The 2009 amendment added (g).

The 2011 amendment by No. 570 added (b)(2)(E) and (b)(4)(E); in (c)(1)(A), inserted "charge for a" and substituted "felony" for "criminal charge"; and inserted "as defined in this subchapter" in (c)(1)(B);

The 2011 amendment by No. 1137 added (d)(3)(B).

16-98-304. Cost and fees.

(a) The drug court judge may order the offender to pay:

(1) Court costs as provided in § 16-10-305;

(2) Treatment costs;

(3) Drug testing costs;

(4) A program user fee;

(5) Necessary supervision fees, including any applicable residential treatment fees; and

(6) Any fees determined or authorized under § 12-27-125(b)(17)(B) or § 16-93-104(a)(1) which are to be paid to the Department of Community Correction.

(b)(1) The drug court judge shall establish a schedule for the payment of costs and fees.

(2) The cost for treatment, drug testing, and supervision shall be set by the treatment and supervision providers respectively and made part of the order of the drug court judge for payment.

(3) Program user fees shall be set by the drug court judge .

(4) Treatment, drug testing, and supervision costs or fees shall be paid to the respective providers.

(5) Fees determined or authorized under § 12-27-125(b)(17)(B) or § 16-93-104(a)(1) shall be paid to the Department of Community Correction.

(6)(A) The MAGNUM Drug Court Fund is a special revenue fund created and established on the books of the Treasurer of State, the Auditor of State, and the Chief Fiscal Officer of the State.

(B) The MAGNUM Drug Court Fund shall consist of other moneys provided by law.

(7)(A) All court costs and program user fees assessed by the drug court judge shall be paid to the court clerk for remittance to the county treasury under § 14-14-1313.

(B) All court costs shall be credited to the county administration of justice fund and distributed under § 16-10-307.

(C) All program user fees shall be credited to a fund known as the drug court program fund and appropriated by the quorum court for the benefit and administration of the drug court program.

(8) Court orders for costs and fees shall remain an obligation of the offender with court monitoring until fully paid.

History. Acts 2003, No. 1266, § 4; 2009, No. 490, § 1.

Amendments. The 2009 amendment, in (a), inserted "as provided in § 16-10-305" in (a)(1), deleted "not to exceed twenty dollars ($20.00) per month" following "fee" in (a)(4), and inserted (a)(6); in (b), rewrote (b)(3) and (b)(5), substituted "the MAGNUM Drug Court Fund" for "The remaining user fees shall be remitted to the Treasurer of State by the court clerk for deposit in the MAGNUM Drug Court Fund, which" in (b)(6)(A), deleted "user fees and any" following "consist of" in (b)(6)(B), inserted (b)(7), and redesignated the subsequent subdivision accordingly; and made related changes.

16-98-305. Required resources.

Each drug court program established under this subchapter, subject to an appropriation, funding, and position authorization, both programmatic and administrative, shall be provided with the following resources:

(1) The Department of Community Correction shall provide the following pursuant to § 16-98-303(a)(2)(B)(i) for adult offenders:

(A)(i) Except as provided in subdivision (1)(A)(ii) of this section, provide a minimum of one (1) drug counselor position for every thirty (30) drug court participants.

(ii) If a drug court judge does not require the drug counselor position or positions described in subdivision (1)(A)(i) of this section, funding for a drug counselor or counselors shall be provided under subdivision (1)(E)(i) of this section;

(B) Provide a minimum of one (1) probation officer position for every forty (40) drug court participants;

(C) Provide a minimum of one (1) administrative assistant position for each drug court program;

(D) Provide for drug screens and testing as needed; and

(E)(i) Based upon a formula to be developed by the Administrative Office of the Courts, reviewed by the Drug Court Advisory Committee, and approved by the Legislative Council, provide for:

(a) Intensive outpatient treatment to be made available to the drug court program in each judicial district;

(b) Short-term and long-term inpatient treatment to be made available to the drug court program in each judicial district; and

(c) A drug court judge to contract with a local licensed treatment provider for counseling services for drug court participants so that each privately contracted addiction counselor does not have more than thirty (30) drug court participants in his or her caseload.

(ii) The Department of Community Correction shall enter into an interagency memorandum of understanding with the Administrative Office of the Courts in order to establish the process and procedures for the payment of treatment services ordered by a drug court judge and funded through the Department of Community Correction.

(iii) Expenditures of funds for treatment services allocated to each drug court program under the formula described in subdivision (1)(E)(i) of this section shall be at the direction of a drug court judge, except as limited by the procedures adopted in the memorandum of understanding described in subdivision (1)(E)(ii) of this section;

(2) The Department of Human Services shall:

(A) Provide a minimum of one (1) drug counselor position for every thirty (30) drug court participants in delinquency cases, dependency-neglect cases, and family in need of services cases;

(B) Provide for drug screens and testing as needed in delinquency cases, dependency-neglect cases, and family in need of services cases; and

(C) Provide for intensive outpatient treatment and short-term and long-term inpatient treatment to be made available to the drug court program in each judicial district in delinquency cases, dependency-neglect cases, and family in need of services cases based upon a formula developed by the Administrative Office of the Courts and reviewed by the Drug Court Advisory Committee; and

(3) The Administrative Office of the Courts shall:

(A) Provide funding to be reviewed by the Drug Court Advisory Committee for additional ongoing maintenance and operation costs of

local drug court programs not provided by the Department of Community Correction or the Department of Human Services, including local drug court program supplies, education, travel, and related expenses;

(B) Provide direct support to the drug court judge and drug court program;

(C) Provide coordination between the multidisciplinary team and the drug court judge;

(D) Provide case management;

(E) Monitor compliance of drug court participants with drug court program requirements; and

(F) Provide drug court program evaluation and accountability.

History. Acts 2007, No. 1022, § 5.

16-98-306. Collection of data.

(a)(1) A drug court program shall collect and provide data on drug court applicants and all participants as required by the Division of Drug Court Programs within the Administrative Office of the Courts in accordance with the rules promulgated under § 16-98-307.

(2) The data shall include:

(A) The total number of applicants;

(B) The total number of participants;

(C) The total number of successful applicants;

(D) The total number of successful participants;

(E) The reason why each unsuccessful participant did not complete the program;

(F) Information about what happened to each unsuccessful participant;

(G) The total number of participants who were arrested for a new criminal offense while in the drug court program;

(H) The total number of participants who were convicted of a new criminal offense while in the drug court program;

(I) The total number of participants who committed a violation of one (1) or more conditions of the drug court program and the resulting sanction;

(J) The results of the initial risk-needs assessment review for each participant; and

(K) Any other data or information as required by the Division of Drug Court Programs within the Administrative Office of the Courts in accordance with the rules promulgated under § 16-98-307.

(b) The data collected for evaluation purposes under subsection (a) of this section shall:

(1) Include a minimum standard data set developed and specified by the Division of Drug Court Programs; and

(2) Be maintained in the court files or be otherwise accessible by the courts and the Division of Drug Court Programs.

(c)(1) As directed by the Division of Drug Court Programs, after an individual is discharged either upon completion or termination of a drug court program, the drug court program shall conduct, as much as practical, follow-up contacts with and reviews of former drug court participants for key outcome indicators of drug use, recidivism, and employment.

(2)(A) The follow-up contacts with and reviews of former drug court participants shall be conducted as frequently and for a period of time as determined by the Division of Drug Court Programs based upon the nature of the drug court program and the nature of the participants.

(B) The follow-up contacts with and reviews of former drug court participants are not extensions of the drug court's jurisdiction over the drug court participants.

(d) For purposes of standardized measurement of success of drug court programs across the state, the Division of Drug Court Programs in consultation with other state agencies and subject to the review of the Drug Court Advisory Committee shall adopt an operational definition of terms such as "recidivism", "retention", "relapses", "restarts", "sanctions imposed", and "incentives given" to be used in any evaluation and report of drug court programs.

(e) Each drug court program shall provide to the Division of Drug Court Programs all information requested by the Division of Drug Court Programs.

(f) The Division of Drug Court Programs, the Department of Community Correction, the Office of Alcohol and Drug Abuse Prevention, and the Arkansas Crime Information Center shall work together to share and make available data to provide a comprehensive data management system for the state's drug court programs.

(g)(1) The Administrative Office of the Courts shall:

(A) Develop a statewide evaluation model to be reviewed by the Drug Court Advisory Committee; and

(B) Conduct ongoing evaluations of the effectiveness and efficiency of all drug court programs.

(2) A report of the evaluations of the Administrative Office of the Courts shall be submitted to the General Assembly by July 1 of each year.

History. Acts 2007, No. 1022, § 5; 2011, No. 570, § 116.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment substituted "and all participants" for "drug court participants, and the entire drug court program" in (a)(1); and added (a)(2).

16-98-307. Drug Court Advisory Committee — Creation.

(a) There is created a Drug Court Advisory Committee.

(b) The Drug Court Advisory Committee shall consist of the following members:

(1) The Chief Justice of the Supreme Court or the Chief Justice's designee who shall serve as chair;

(2) The Director of the Administrative Office of the Courts or the director's designee;

(3) A judge to be appointed by the Arkansas Judicial Council;

(4) The Director of the Department of Community Correction or the director's designee;

(5) The Director of the Department of Human Services or the director's designee;

(6) The Director of the Office of Alcohol and Drug Abuse Prevention or the director's designee;

(7) A prosecutor appointed by the Prosecutor Coordinator;

(8) A public defender appointed by the Executive Director of the Arkansas Public Defender Commission;

(9) A member of the Senate appointed by the President Pro Tempore of the Senate;

(10) A member of the House of Representatives appointed by the Speaker of the House of Representatives;

(11) The Arkansas Drug Director or the director's designee;

(12) The Chair of the Board of Corrections or the chair's designee; and

(13) The Chair of the Parole Board or the chair's designee.

(c) The chair or the chair's designee shall promptly call the first meeting after April 4, 2007.

(d)(1) The committee shall conduct its meetings at the State Capitol or at any place designated by the chair or the chair's designee.

(2) Meetings shall be held at least one (1) time every three (3) months but may occur more often at the call of the chair.

(e) If any vacancy occurs on the committee, the vacancy shall be filled by the same process as the original appointment.

(f) The committee shall establish rules and procedures for conducting its business.

(g) Members of the committee shall serve without compensation.

(h) A majority of the members of the committee shall constitute a quorum for transacting any business of the committee.

(i)(1) The committee is established to promote collaboration and provide recommendations on issues involving drug courts.

(2) The committee may provide advice and review on at least the following:

(A) Provisions to identify data to be collected for evaluation; and

(B) Provisions to ensure uniform data collection.

History. Acts 2007, No. 1022, § 5; 2011, No. 5, § 1.

Amendments. The 2011 amendment added (b)(13).

CHAPTER 99

PERFORMANCE INCENTIVE FUNDING FOR RECIDIVISM AND CRIME REDUCTION

SUBCHAPTER.
1. Performance Incentive Act of 2011.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Subchapter 1 — Performance Incentive Act of 2011

16-99-101. Purpose and intent.

(a) Both state and local agencies that implement criminal justice practices resulting in outcomes that reduce commitments to the Department of Correction should be rewarded.

(b) If a state agency, county, or judicial district has implemented proven risk-reduction strategies that reduce the number of offenders returning to the Department of Correction with no resultant increase in the crime rate; then, in order to reward the state agency, county, or judicial district and as an incentive to encourage similar practices elsewhere, the state agency, county, or judicial district should receive a monetary reward to continue those practices.

(c) The award would represent a portion of the monetary savings from the costs that would have been incurred had the state agency, county, or judicial district not reduced its impact on the Department of Correction.

(d) The goal of this chapter is to align state and local fiscal incentives by rewarding the Department of Community Correction, county governments, and judicial districts for each entity's role in reducing its impact on the Department of Correction.

History. Acts 2011, No. 570, § 117.

16-99-102. Program authorized — Administration.

(a) Costs averted due to a reduction in commitments to the Department of Correction or a reduction in the period of time served in the Department of Correction, to the extent possible, shall be reinvested into those state agencies, counties, or judicial districts as an incentive

to further the crime and recidivism reduction strategies being employed.

(b) The Department of Community Correction shall be the recipient of incentive funds upon meeting the requirements set out in this subchapter.

(c)(1) Counties, multicounty partnerships, and judicial districts shall be eligible to apply for participation in the performance incentive funding program set out in this subchapter on the reduction in the Department of Correction's population.

(2) Participation in the program will be determined through a competitive grant process.

(d) The Board of Corrections shall have the authority to manage the program and administer the grant funds to appropriate applicants and the Department of Community Correction.

(e)(1) Subject to the available funding, the Department of Community Correction shall manage and administer grant funds to itself and counties, multicounty partnerships, and judicial districts in order to implement the policies and programs authorized by this program.

(2) These shall be one-time-only grants not contingent on measured performance.

(3) All future funding under this section shall be tied to measured performance.

History. Acts 2011, No. 570, § 117.

16-99-103. Application.

(a)(1) The Department of Community Correction shall receive additional funding for committing to a reduction in the number of probation revocations that result from a technical violation or a new crime.

(2) The baseline for comparing probation revocation data shall be based on the number of probation revocations and expected length of stay.

(3) In order to qualify for the additional monetary incentives under this subchapter, the felony conviction rate for probationers must remain stable or decrease from the previous year.

(4) Each year the Department of Community Correction shall receive additional funds for reducing the net impact of revocations on the Department of Correction.

(5) The Department of Community Correction shall promulgate rules and regulations for the distribution and use of incentive funds that it receives, requiring that:

(A) No less than one-third (⅓) of the funds received each year are distributed to the individual probation or parole areas responsible for the revocation reductions while maintaining or improving public safety; and

(B) All of the funds received by the Department of Community Correction are invested in programs and practices designed to reduce recidivism.

(b)(1) A competitive grant process will distribute grants to five (5) individual counties, multicounty partnerships, or judicial districts that meet criteria established to improve public safety and reduce their net impact on the Department of Correction.

(2) The Board of Corrections shall have the authority to:

(A) Manage the competitive grant process;

(B) Determine appropriate criteria;

(C) Award grants; and

(D) Collect and evaluate the data from all grantee sites.

(3) Applications can come from:

(A) Individual counties;

(B) Multicounty partnerships; or

(C) Judicial districts.

(4) Four (4) of the five (5) grants shall be awarded to the counties, multicounty partnerships, or judicial districts with the largest number of annual Department of Correction commitments that meet the program criteria and submit acceptable applications.

(5) One (1) grant shall be awarded to a county, multicounty partnership, or judicial district representing a rural region of the state, notwithstanding the number of Department of Correction commitments from the applicant so long as the program criteria are met and the application is acceptable.

(6) Each year, the grant recipient shall receive additional funds equal to one-half (½) of the averted costs for reducing the net impact of its sentences on the Department of Correction.

(7) The baseline for comparing the net impact of sentences shall be based on the number of admissions and expected length of stay.

(8) In order to qualify for the additional monetary incentives under this subchapter, the net impact of the county's, and multicounty's, judicial district's above-guidelines sentences, based on admissions and expected length of stay, must remain stable or decrease from the previous year.

(9) The Board of Corrections shall promulgate rules and regulations for the distribution and use of incentive funds to successful applicants.

History. Acts 2011, No. 570, § 117.

16-99-104. Implementation.

The Board of Corrections shall:

(1) Establish rules and regulations for counties, multicounty partnerships, or judicial districts to apply for funds under this subchapter;

(2) Calculate and determine the baseline for the Department of Community Correction's revocation rate and for the Department of Correction's commitments' length of stay for evaluation purposes; and

(3) Calculate the averted costs to determine the amount to redirect to successful applicants who qualify for funds awarded under the performance incentive funding program.

History. Acts 2011, No. 570, § 117.

16-99-105. Reporting and data collection.

(a)(1) The Department of Community Correction shall provide data and information as requested by the Board of Corrections.

(2) That data and information shall include without limitation:

(A) The total number of probationers from each of the Department of Community Correction's individual probation or parole areas for the current year and previous years, as available;

(B) The total number of probation revocations, including revocations that result from violations and from new crimes for the current year and previous years, as available;

(C) The total number of new felony convictions and the rate of new felony convictions from each of the Department of Community Correction's individual probation or parole areas for the current year and previous years, as available;

(D) The amount of grant funds distributed to each individual probation or parole areas; and

(E)(i) The evidence-based programs established or enhanced by the Department of Community Correction as part of its effort to reduce revocations and improve public safety; and

(ii) Any subsequent evidence-based programs that contribute to the outcomes of the performance incentive funding program under this subchapter.

(b) Each grantee shall provide data and information as requested by the Board of Corrections, including without limitation:

(1) The list of counties, if in a multicounty partnership, participating;

(2) The amount of grant funds distributed under this chapter to each county, multicounty partnership, or judicial district; and

(3) The programs established or enhanced as part of each applicant's successful grant proposal and any subsequent evidence-based programs that contribute to the outcomes of the program under this chapter.

(c) The board shall report all data, findings, and recommendations annually for improvement to the:

(1) Governor;

(2) Chief Justice of the Supreme Court;

(3) Director of the Administrative Office of the Courts;

(4) Speaker of the House of Representatives;

(5) President of the Senate;

(6) Chair of the House Judiciary Committee; and

(7) Chair of the Senate Judiciary Committee.

(d)(1) The board's report shall include an analysis of the impact of the performance incentive funding program.

(2) This analysis shall include without limitation the effect, compared to baseline, on net Department of Correction bed usage by the Department of Community Correction and by all county grantees, as well as Department of Correction admissions and lengths-of-stay,

moneys paid out, revocation rates and new crime conviction rates for the Department of Community Correction, and guidelines compliance for participating counties.

(3) The board shall provide analyses on an area-by-area basis for the Department of Community Correction performance incentive funding program and on a county-by-county, multicounty-partnership, or judicial-district basis for the local performance-incentive funding program.

(e) The board shall conduct a study and make recommendations, as needed, to those persons or entities listed in subsection (b) of this section, three (3) years after the implementation of the program established under this chapter and every third year thereafter to determine whether to change the baseline year that determines revocation reduction benchmarks.

History. Acts 2011, No. 570, § 117.

SUBTITLE 7. PARTICULAR PROCEEDINGS AND REMEDIES

CHAPTER 106

ACTIONS BY OR AGAINST STATE

Subchapter 1 — General Provisions

16-106-101. Actions generally.

CASE NOTES

Venue Where Defendant Resides.

Where candidate filed a petition for qualification as an independent candidate for the office of Arkansas House of Representatives and his petition was denied because it did not contain the required number of verified signatures, the candidate erred by filing a civil rights action against the Arkansas Secretary of State in the Phillips County Circuit Court; subsection (d) of this section required the suit to be filed in Pulaski County, Arkansas. Daniels v. Weaver, 367 Ark. 327, 240 S.W.3d 95 (2006).

Cited: Ark. Game Fish Comm'n v. Mills, 371 Ark. 317, 265 S.W.3d 760 (2007); State v. Hammame, 102 Ark. App. 87, 282 S.W.3d 278 (2008).

CHAPTER 108

ARBITRATION AND AWARD

SUBCHAPTER.

2. Uniform Arbitration Act.

Subchapter 1 — General Provisions

16-108-101. Proceedings.

CASE NOTES

Applicability.

Federal Arbitration Act (FAA), 9 U.S.C.S. § 1 et seq., not the Arkansas Uniform Arbitration Act, applied to the parties' agreement. Both parties acknowledged that the parties' distribution agreement involved interstate commerce, and the agreement specifically stated that the FAA applied "as needed to uphold the validity or enforceability of the arbitration provisions of this Agreement." Gruma Corp. v. Morrison, 2010 Ark. 151, — S.W.3d — (2010).

Subchapter 2 — Uniform Arbitration Act

Publisher's Notes. Acts 2011, No. 695, § 1, completely revised this subchapter. Where appropriate, prior histories have been carried over under the new section numbers. Former §§ 16-108-215, 16-108-221 through 16-108-224 were deleted altogether. Those sections were derived from:

16-108-215. Acts 1969, No. 260, § 15; A.S.A. 1947, § 34-525.

16-108-221. Acts 1969, No. 260, § 21; A.S.A. 1947, § 34-531.

16-108-222. Acts 1969, No. 260, § 22.

16-108-223. Acts 1969, No. 260, § 23; A.S.A. 1947, § 34-532.

16-108-224. Acts 1969, No. 260, § 24.

16-108-201. Definitions.

As used in this subchapter:

(1) "Arbitration organization" means an association, agency, board, commission, or other entity that is neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator;

(2) "Arbitrator" means an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate;

(3) "Court" means a court of competent jurisdiction in this state;

(4) "Knowledge" means actual knowledge;

(5) "Person" means:

(A) An individual;

(B) A corporation;

(C) A business trust;

(D) An estate;

(E) A trust;

(F) A partnership;

(G) A limited liability company;

(H) An association;

(I) A joint venture;

(J) A government;

(K) A governmental subdivision, agency, or instrumentality;

(L) A public corporation; or

(M) Any other legal or commercial entity; and

(6) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

History. Acts 2011, No. 695, § 1.

16-108-202. Notice.

(a) Except as otherwise provided in this subchapter, a person gives notice to another person by taking action that is reasonably necessary to inform the other person in ordinary course, whether or not the other person acquires knowledge of the notice.

(b)(1) A person has notice if the person has knowledge of the notice or has received notice.

(2) A person receives notice when it comes to the person's attention or the notice is delivered at the person's place of residence or place of business, or at another location held out by the person as a place of delivery of such communications.

History. Acts 2011, No. 695, § 1.

16-108-203. When subchapter applies.

(a) This subchapter governs an agreement to arbitrate made on or after the effective date of this subchapter.

(b) This subchapter governs an agreement to arbitrate made before the effective date of this subchapter if all the parties to the agreement or to the arbitration proceeding so agree in a record.

History. Acts 2011, No. 695, § 1.

16-108-204. Effect of agreement to arbitrate — Party may not waive provisions.

(a) Except as otherwise provided in subsections (b) and (c) of this section, a party to an agreement to arbitrate or to an arbitration proceeding may waive, or the parties may vary the effect of, the requirements of this subchapter to the extent permitted by law.

(b) Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not:

(1) Waive or agree to vary the effect of the requirements of:

(A) Section 16-108-205(a);

(B) Section 16-108-206(a);

(C) Section 16-108-208;

(D) Section 16-108-217(a);

(E) Section 16-108-217(b);

(F) Section 16-108-226; or

(G) Section 16-108-228;

(2) Agree to unreasonably restrict the right under § 16-108-209 to notice of the initiation of an arbitration proceeding;

(3) Agree to unreasonably restrict the right under § 16-108-212 to disclosure of any facts by a neutral arbitrator; or

(4)(A) Waive the right under § 16-108-216 of a party to an agreement to arbitrate to be represented by a lawyer at any proceeding or hearing under this subchapter.

(B) However, an employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration.

(c) A party to an agreement to arbitrate or arbitration proceeding may not waive, or the parties may not vary the effect of, the requirements of:

(1) This section;

(2) Section 16-108-203(a);

(3) Section 16-108-207;

(4) Section 16-108-214;

(5) Section 16-108-218;

(6) Section 16-108-220(d);

(7) Section 16-108-220(e);

(8) Section 16-108-222;

(9) Section 16-108-223;

(10) Section 16-108-224;

(11) Section 16-108-225(a);
(12) Section 16-108-225(b);
(13) Section 16-108-229; or
(14) Section 16-108-230.

History. Acts 2011, No. 695, § 1.

16-108-205. Application for judicial relief.

(a) Except as otherwise provided in § 16-108-228, an application for judicial relief under this subchapter must be made by motion to the court and heard in the manner provided by law or rule of court for making and hearing motions.

(b)(1) Unless a civil action involving the agreement to arbitrate is pending, notice of an initial motion to the court under this subchapter must be served in the manner provided by law for the service of a summons in a civil action.

(2) Otherwise, notice of the motion must be given in the manner provided by law or rule of court for serving motions in pending cases.

History. Acts 1969, No. 260, § 16; A.S.A. 1947, § 34-526; Acts 2011, No. 695, § 1.

16-108-206. Validity of agreement to arbitrate.

(a) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.

(b) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(c) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

(d) If a party to a judicial proceeding challenges the existence of or claims that a controversy is not subject to an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

History. Acts 1969, No. 260, § 1; 1981, No. 616, § 1; A.S.A. 1947, § 34-511; Acts 1993, No. 287, § 1; 2003, No. 1185, § 224; 2011, No. 695, § 1.

RESEARCH REFERENCES

Ark. L. Rev. Note, Issue Preclusion Is No Illusion for Arbitration in Arkansas: Riverdale Development Co. v. Ruffin Building Systems, Inc., 58 Ark. L. Rev. 929.

CASE NOTES

Applicability.

Trial court properly denied defendants' motion to compel arbitration in plaintiff's negligence action because although plaintiff agreed that any claims that she had against defendants would be governed by the Arkansas Uniform Arbitration Act, the Act specifically excluded claims sounding in tort from its boundaries. Wyatt v. Giles, 95 Ark. App. 204, 35 S.W.3d 552 (2006).

Farm owners' claims against a poultry processor for violation of the Arkansas Deceptive Trade Practices Act, § 4-88-101 et seq., were arbitrable under a broad arbitration clause contained in an agreement between the parties; an Arkansas choice-of-law provision in the agreement did not require application of § 16-108-201(b)(2) of the Arkansas Uniform Arbitration Act, under which contractual arbitration provisions did not apply to tort claims. Hudson v. Conagra Poultry Co., 484 F.3d 496 (8th Cir. 2007).

In a dispute arising out of an agreement to buy an insurance brokerage corporation, the parties' stock-purchase agreement was referred to in order to determine if the purchasers, a trustee, trusts, and family members, intended to arbitrate their dispute with a financial corporation. The agreement indicated that the trustee's, trusts', and family members' claims, which included tort claims stemming from a breach of contract claim, fell squarely within the agreement. Ruth R. Remmel Revocable Trust v. Regions Fin. Corp., 369 Ark. 392, 255 S.W.3d 453 (2007), rehearing denied, Remmel Trust v. Regions Fin. Corp., — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 429 (May 17, 2007).

In a case in which a nursing home facility sought to arbitrate an underlying state case for wrongful death pursuant to an arbitration clause in the admission agreement and the special administratrix argued that the arbitration clause was an attempt to contract away the deceased's constitutional right to a jury, while subdivision (b)(2) of this section provided that an agreement to arbitrate had no application to personal injury or tort matters, the Federal Arbitration Act preempted state law which would invalidate an otherwise valid agreement to arbitrate. Northport Health Servs. of Ark., LLC v. Robinson, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 6482 (W.D. Ark. Jan. 12, 2009).

Cited: Asbury Auto. Used Car Ctr., L.L.C. v. Brosh, 364 Ark. 386, 220 S.W.3d 637 (2005).

16-108-207. Motion to compel or stay arbitration.

(a) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:

(1) If the refusing party does not appear or does not oppose the motion, the court shall order the parties to arbitrate; and

(2) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

(b)(1) On motion of a person alleging that an arbitration proceeding has been initiated or threatened but that there is no agreement to arbitrate, the court shall proceed summarily to decide the issue.

(2) If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate.

(c) If the court finds that there is no enforceable agreement, it may not under subsection (a) or subsection (b) of this section order the parties to arbitrate.

(d) The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established.

(e)(1) If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in court, a motion under this section must be made in that court.

(2) Otherwise, a motion under this section may be made in any court as provided in § 16-108-227.

(f) If a party makes a motion to the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.

(g)(1) If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration.

(2) If a claim subject to the arbitration is severable, the court may limit the stay to that claim.

History. Acts 1969, No. 260, § 2; A.S.A. 1947, § 34-512; Acts 2011, No. 695, § 1.

RESEARCH REFERENCES

ALR. Application of Equitable Estoppel by Nonsignatory to Compel Arbitration — Federal Cases. 39 A.L.R. Fed. 2d 17.

Application of Equitable Estoppel Against Nonsignatory to Compel Arbitration Under Federal Law. 43 A.L.R. Fed. 2d 275.

CASE NOTES

Analysis

Agreement for Arbitration.
Mutuality of Obligation.

Agreement for Arbitration.

Appellant investment firm's motion to compel arbitration pursuant to the Federal Arbitration Act was properly denied because, although an arbitration clause in an account agreement covered a conversion claim if there were a contract between the parties, the question of an attorney's agency in creating the account with appellee clients' money remained to be tried before it could be decided if the parties, the clients and the investment firm, had a contract. Sterne, Agee & Leach, Inc. v. Way, 101 Ark. App. 23, 270 S.W.3d 369 (2007).

Pursuant to subsection (d) of this section, the appellate court's reversal only pertained to the appellees' breach of contract claims, which shall be stayed and ordered to arbitration. Hot Spring County Med. Ctr. v. Ark. Radiology Affiliates, P.A., 103 Ark. App. 252, 288 S.W.3d 676 (2008).

Mutuality of Obligation.

Used car center's motion to compel arbitration under subsection (a) of this section was properly denied where the arbitration agreement lacked mutuality; because the arbitration agreement lacked mutuality of obligation, the arbitration clauses were unenforceable. Asbury Auto. Used Car Ctr., L.L.C. v. Brosh, 364 Ark. 386, 220 S.W.3d 637 (2005).

16-108-208. Provisional remedies.

(a) Before an arbitrator is appointed and is authorized and able to act, the court, upon motion of a party to an arbitration proceeding and for good cause shown, may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding to the same

extent and under the same conditions as if the controversy were the subject of a civil action.

(b) After an arbitrator is appointed and is authorized and able to act:

(1) The arbitrator may issue such orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action; and

(2) A party to an arbitration proceeding may move the court for a provisional remedy only if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy.

(c) A party does not waive a right of arbitration by making a motion under subsection (a) or subsection (b) of this section.

History. Acts 2011, No. 695, § 1.

16-108-209. Initiation of arbitration.

(a)(1) A person initiates an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate:

(A) In the agreed manner between the parties;

(B) In the absence of agreement, by:

(i) Certified or registered mail, return receipt requested and obtained; or

(ii) Service as authorized for the commencement of a civil action.

(2) The notice must describe the nature of the controversy and the remedy sought.

(b) Unless a person objects for lack or insufficiency of notice under § 16-108-215(c) not later than the beginning of the arbitration hearing, the person, by appearing at the hearing, waives any objection to lack of or insufficiency of notice.

History. Acts 2011, No. 695, § 1.

16-108-210. Consolidation of separate arbitration proceedings.

(a) Except as otherwise provided in subsections (c) and (d) of this section, upon motion of a party to an agreement to arbitrate or to an arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims if:

(1) There are separate agreements to arbitrate or separate arbitration proceedings between the same persons, or one (1) of them is a party to a separate agreement to arbitrate or a separate arbitration proceeding with a third person;

(2) The claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;

(3) The existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and

(4) Prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

(b) The court may order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.

(c) Except as provided in subsection (d) of this section, the court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation.

(d)(1) An agreement that prohibits the consolidation of arbitration claims or proceedings or denies arbitration for a class of persons involving substantially similar issues shall be closely scrutinized and shall not be enforced if found unconscionable.

(2) An agreement may be found unconscionable under this subdivision (d) if:

(A) The agreement is unreasonable, one-sided, or contains language that is difficult to notice or to understand;

(B) A meaningful choice of whether or not to agree to the arbitration provisions of the agreement is not provided; or

(C) The agreement is not balanced or fair under reasonable standards of fair dealing.

History. Acts 2011, No. 695, § 1.

16-108-211. Appointment of arbitrator — Service as a neutral arbitrator.

(a)(1) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed unless the method fails.

(2)(A) If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator.

(B) An arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method.

(b) An individual who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party may not serve as an arbitrator required by an agreement to be neutral.

History. Acts 1969, No. 260, § 3; A.S.A. 1947, § 34-513; Acts 2011, No. 695, § 1.

16-108-212. Disclosure by arbitrator.

(a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and the arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(1) A financial or personal interest in the outcome of the arbitration proceeding; and

(2) An existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrator.

(b) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and the arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator.

(c) If an arbitrator discloses a fact required by subsection (a) or subsection (b) of this section to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be a ground under § 16-108-223(a)(2) for vacating an award made by the arbitrator.

(d) If the arbitrator did not disclose a fact as required by subsection (a) or subsection (b) of this section, the court under § 16-108-223(a)(2) may vacate an award, upon timely objection by a party.

(e) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under § 16-108-223(a)(2).

(f) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on that ground under § 16-108-223(a)(2).

History. Acts 2011, No. 695, § 1.

16-108-213. Action by majority.

If there is more than one (1) arbitrator, the powers of an arbitrator must be exercised by a majority of the arbitrators, but all arbitrators shall conduct the hearing under § 16-108-215(c).

History. Acts 1969, No. 260, § 4; A.S.A. 1947, § 34-514; Acts 2011, No. 695, § 1.

16-108-214. Immunity of arbitrator — Competency to testify — Attorney's fees and costs.

(a) An arbitrator or an arbitration organization acting in that capacity is immune from civil damages for any statement or decision made in connection with or arising out of the conduct of an arbitrator in a dispute resolution process unless the person acted in a manner exhibiting willful or wanton misconduct.

(b) The immunity afforded by this section supplements any immunity under other law.

(c) The failure of an arbitrator to make a disclosure required by § 16-108-212 does not cause any loss of qualified immunity under this section.

(d)(1) In a judicial, administrative, or similar proceeding, an arbitrator or representative of an arbitration organization is not competent to testify and may not be required to produce records as to any statement, conduct, decision, or ruling occurring during the arbitration proceeding, to the same extent as a judge of a court of this state acting in a judicial capacity.

(2) Subdivision (d)(1) of this section does not apply to:

(A) The extent necessary to determine the claim of an arbitrator, arbitration organization, or representative of the arbitration organization against a party to the arbitration proceeding; or

(B) A hearing on a motion to vacate an award under § 16-108-223(a)(1) or (a)(2) if the movant establishes prima facie that a ground for vacating the award exists.

(e) If a person commences a civil action against an arbitrator, arbitration organization, or representative of an arbitration organization arising from the services of the arbitrator, organization, or representative or if a person seeks to compel an arbitrator or a representative of an arbitration organization to testify or produce records in violation of subsection (d) of this section, and the court decides that the arbitrator, arbitration organization, or representative of an arbitration organization is immune from civil liability or that the arbitrator or representative of the organization is not competent to testify, the court shall award to the arbitrator, organization, or representative reasonable attorney's fees and other reasonable expenses of litigation.

History. Acts 2011, No. 695, § 1.

16-108-215. Arbitration process.

(a)(1) An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding.

(2) The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and, among other matters, determine the admissibility, relevance, materiality, and weight of any evidence.

(b) An arbitrator may decide a request for summary disposition of a claim or particular issue:

(1) If all interested parties agree; or

(2) Upon request of one (1) party to the arbitration proceeding if that party gives notice to all other parties to the proceeding, and the other parties have a reasonable opportunity to respond.

(c)(1) If an arbitrator orders a hearing, the arbitrator shall set a time and place and give notice of the hearing not less than five (5) days before the hearing begins.

(2) Unless a party to the arbitration proceeding makes an objection to lack or insufficiency of notice not later than the beginning of the hearing, the party's appearance at the hearing waives the objection.

(3) Upon request of a party to the arbitration proceeding and for good cause shown, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing from time to time as necessary but may not postpone the hearing to a time later than that fixed by the agreement to arbitrate for making the award unless the parties to the arbitration proceeding consent to a later date.

(4) The arbitrator may hear and decide the controversy upon the evidence produced although a party who was notified of the arbitration proceeding does not appear.

(5) The court, on request, may direct the arbitrator to conduct the hearing promptly and render a timely decision.

(d) At a hearing under subsection (c) of this section, a party to the arbitration proceeding has a right to:

(1) Be heard;

(2) Present evidence material to the controversy; and

(3) Cross-examine witnesses appearing at the hearing.

(e) If an arbitrator ceases or is unable to act during the arbitration proceeding, a replacement arbitrator must be appointed under § 16-108-211 to continue the proceeding and to resolve the controversy.

History. Acts 1969, No. 260, § 5; A.S.A. 1947, § 34-515; Acts 2011, No. 695, § 1.

RESEARCH REFERENCES

ALR. Consolidation by State Court of Arbitration Proceedings Brought Under State Law. 31 A.L.R.6th 433.

16-108-216. Representation by lawyer.

A party to an arbitration proceeding may be represented by a lawyer.

History. Acts 1969, No. 260, § 6; A.S.A. 1947, § 34-516; Acts 2011, No. 695, § 1.

16-108-217. Witnesses — Subpoenas — Depositions — Discovery.

(a)(1) An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths.

(2) A subpoena must be served in the manner for service of subpoenas in a civil action and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner for enforcement of subpoenas in a civil action.

(b)(1) In order to make the proceedings fair, expeditious, and cost effective, upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing.

(2) The arbitrator shall determine the conditions under which the deposition is taken.

(c) An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective.

(d) If an arbitrator permits discovery under subsection (c) of this section, the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery-related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding, and take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this state.

(e) An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this state.

(f) All laws compelling a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition, or a discovery proceeding as a witness apply to an arbitration proceeding as if the controversy were the subject of a civil action in this state.

(g)(1) The court may enforce a subpoena or discovery-related order for the attendance of a witness within this state and for the production of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another state upon conditions determined by the court so as to make the arbitration proceeding fair, expeditious, and cost effective.

(2) A subpoena or discovery-related order issued by an arbitrator in another state must be served in the manner provided by law for service of subpoenas in a civil action in this state and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this state.

History. Acts 1969, No. 260, § 7; A.S.A. 1947, § 34-517; Acts 2011, No. 695, § 1.

RESEARCH REFERENCES

ALR. Discovery in Federal Arbitration Proceedings Under Discovery Provision of Federal Arbitration Act (FAA), 9 USCS § 7, and Federal Rules of Civil Procedure, as Permitted by Fed. R. Civ. P. 81(a)(6)(B). 45 A.L.R. Fed. 2d 51.

16-108-218. Judicial enforcement of preaward ruling by arbitrator.

(a) If an arbitrator makes a preaward ruling in favor of a party to the arbitration proceeding, the party may request the arbitrator to incorporate the ruling into an award under § 16-108-219.

(b)(1) A prevailing party may make a motion to the court for an expedited order to confirm the award under § 16-108-222, in which case the court shall summarily decide the motion.

(2) The court shall issue an order to confirm the award unless the court vacates, modifies, or corrects the award under § 16-108-223 or § 16-108-224.

History. Acts 2011, No. 695, § 1.

16-108-219. Award.

(a)(1)(A) An arbitrator shall make a record of an award.

(B) The record must be signed or otherwise authenticated by any arbitrator who concurs with the award.

(2) The arbitrator or the arbitration organization shall give notice of the award, including a copy of the award, to each party to the arbitration proceeding.

(b)(1) An award must be made within the time specified by the agreement to arbitrate or, if not specified in the agreement, within the time ordered by the court.

(2)(A) The court may extend or the parties to the arbitration proceeding may agree in a record to extend the time.

(B) The court or the parties may do so within or after the time specified or ordered.

(3) A party waives any objection that an award was not timely made unless the party gives notice of the objection to the arbitrator before receiving notice of the award.

History. Acts 1969, No. 260, § 8; A.S.A. 1947, § 34-518; Acts 2011, No. 695, § 1.

16-108-220. Change of award by arbitrator.

(a) On motion to an arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct an award:

(1) Upon a ground stated in § 16-108-224(a)(1) or § 16-108-224(a)(3);

(2) Because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) To clarify the award.

(b) A motion under subsection (a) of this section must be made and notice given to all parties within twenty (20) days after the movant receives notice of the award.

(c) A party to the arbitration proceeding must give notice of any objection to the motion within ten (10) days after receipt of the notice.

(d) If a motion to the court is pending under § 16-108-222, § 16-108-223, or § 16-108-224, the court may submit the claim to the arbitrator to consider whether to modify or correct the award:

(1) Upon a ground stated in § 16-108-224(a)(1) or § 16-108-224(a)(3);

(2) Because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) To clarify the award.

(e) An award modified or corrected under this section is subject to § 16-108-219(a) and §§ 16-108-222 — 16-108-224.

History. Acts 1969, No. 260, § 9; A.S.A. 1947, § 34-519; Acts 2011, No. 695, § 1.

16-108-221. Remedies — Fees and expenses of arbitration proceeding.

(a)(1) An arbitrator may award any damages that a court is authorized to award by law in a civil action involving the same claim, and the evidence produced at the hearing justifies the award under the legal standard otherwise applicable to the claim.

(2) An arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.

(b)(1) As to all remedies other than those authorized by subsection (a) of this section, an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding.

(2) The fact that such a remedy could not or would not be granted by the court is not a ground for:

(A) Refusing to confirm an award under § 16-108-222; or

(B) Vacating an award under § 16-108-223.

(c) An arbitrator's expenses and fees, together with other expenses, must be paid as provided in the award.

(d) If requested by a party at any time prior to receipt of notice of the award, the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award.

History. Acts 1969, No. 260, § 10; A.S.A. 1947, § 34-520; Acts 2011, No. 695, § 1.

16-108-222. Confirmation of award.

After a party to an arbitration proceeding receives notice of an award, the party may make a motion to the court for an order confirming the award, at which time the court shall issue a confirming order unless the award is modified or corrected under § 16-108-220 or § 16-108-224 or is vacated under § 16-108-223.

History. Acts 1969, No. 260, § 11; A.S.A. 1947, § 34-521; Acts 2011, No. 695, § 1.

CASE NOTES

Judicial Review.

Legislature did not intend for § 17-42-107(b), regarding the capacity to sue for real estate commissions, to operate to prohibit individuals from consummating their arbitration proceeding by having a circuit court confirm their award and enter judgment thereon; to hold otherwise would deprive arbitrating parties of their traditional remedies, and the confirmation of an arbitration award could not be likened to filing suit. Keahey v. Plumlee, 94 Ark. App. 121, 226 S.W.3d 31 (2006).

16-108-223. Vacating award.

(a) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

(1) The award was procured by corruption, fraud, or other undue means;

(2) There was:

(A) Evident partiality by an arbitrator appointed as a neutral arbitrator;

(B) Corruption by an arbitrator; or

(C) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to § 16-108-215 so as to prejudice substantially the rights of a party to the arbitration proceeding;

(4) An arbitrator exceeded the arbitrator's powers;

(5) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under § 16-108-215(c) not later than the beginning of the arbitration hearing; or

(6) The arbitration was conducted without proper notice of the initiation of an arbitration as required in § 16-108-209 so as to prejudice substantially the rights of a party to the arbitration proceeding.

(b) A motion under this section must be filed within ninety (90) days after the movant receives notice of the award under § 16-108-219 or within ninety (90) days after the movant receives notice of a modified or corrected award under § 16-108-220, unless the movant alleges that the award was procured by corruption, fraud, or other undue means, in which case the motion must be made within ninety (90) days after the ground is known or, by the exercise of reasonable care, would have been known by the movant.

(c)(1) If the court vacates an award on a ground other than that set forth in subdivision (a)(5) of this section, it may order a rehearing.

(2) If the award is vacated on a ground stated in subdivision (a)(1) or (a)(2) of this section, the rehearing must be before a new arbitrator.

(3) If the award is vacated on a ground stated in subdivision (a)(3), (a)(4), or (a)(6) of this section, the rehearing may be before the arbitrator who made the award or the arbitrator's successor.

(4) The arbitrator must render the decision in the rehearing within the same time as that provided in § 16-108-219(b) for an award.

(d) If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award is pending.

History. Acts 1969, No. 260, § 12; A.S.A. 1947, § 34-522; Acts 2003, No. 1185, § 225; 2011, No. 695, § 1.

CASE NOTES

Grounds.

Trial court properly refused to vacate an arbitral decision under subsection (a) of this section that held that the renewal provisions in a lease constituted an express covenant for continued renewals as: (1) the arbitrators attempted to ascertain the parties' intent; (2) the mining lease required a substantial capital investment by the tenants such that they intended the lease to continue for an extended period; (3) the landlords were paid the fair market rate for stone and rock; (4) the renewal language was more specific than an ordinary covenant to renew; and (5) the arbitrators acted within their jurisdiction. Parks v. Rogers Group, Inc., 2011 Ark. App. 109, — S.W.3d — (2011).

16-108-224. Modification or correction of award.

(a) Upon motion made within ninety (90) days after the movant receives notice of the award under § 16-108-219 or within ninety (90) days after the movant receives notice of a modified or corrected award under § 16-108-220, the court shall modify or correct the award if:

(1) There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;

(2) The arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted; or

(3) The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

(b)(1) If a motion made under subsection (a) of this section is granted, the court shall modify or correct and confirm the award as modified or corrected.

(2) Otherwise, unless a motion to vacate is pending, the court shall confirm the award.

(c) A motion to modify or correct an award under this section may be joined with a motion to vacate the award.

History. Acts 1969, No. 260, § 13; A.S.A. 1947, § 34-523; Acts 2011, No. 695, § 1.

16-108-225. Judgment on award — Attorney's fees and litigation expenses.

(a)(1) Upon granting an order confirming, vacating without directing a rehearing, modifying, or correcting an award, the court shall enter a judgment in conformity with the award.

(2) The judgment may be recorded, docketed, and enforced as any other judgment in a civil action.

(b) A court may allow reasonable costs of the motion and subsequent judicial proceedings.

(c) On application of a prevailing party to a contested judicial proceeding under § 16-108-222, § 16-108-223, or § 16-108-224, the court may add reasonable attorney's fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award.

History. Acts 1969, No. 260, § 14; A.S.A. 1947, § 34-524; Acts 2011, No. 695, § 1.

16-108-226. Jurisdiction.

(a) A court of this state having jurisdiction over the controversy and the parties may enforce an agreement to arbitrate.

(b) An agreement to arbitrate providing for arbitration in this state confers exclusive jurisdiction on the court to enter judgment on an award under this subchapter.

History. Acts 1969, No. 260, § 17; A.S.A. 1947, § 34-527; Acts 2003, No. 1185, § 226; 2011, No. 695, § 1.

CASE NOTES

Arbitration.

Legislature did not intend for § 17-42-107(b), regarding the capacity to sue for real estate commissions, to operate to prohibit individuals from consummating their arbitration proceeding by having a circuit court confirm their award and enter judgment thereon; to hold otherwise would deprive arbitrating parties of their traditional remedies, and the confirma-

tion of an arbitration award could not be likened to filing suit. Keahey v. Plumlee, 94 Ark. App. 121, 226 S.W.3d 31 (2006).

16-108-227. Venue.

(a)(1) A motion under § 16-108-205 must be made in the court of the county in which the agreement to arbitrate specifies the arbitration hearing is to be held or, if the hearing has been held, in the court of the county in which it was held.

(2) Otherwise, the motion may be made in the court of any county in which an adverse party resides or has a place of business or, if no adverse party has a residence or place of business in this state, in the court of any county in this state.

(b) All subsequent motions must be made in the court hearing the initial motion unless the court otherwise directs.

History. Acts 1969, No. 260, § 18; A.S.A. 1947, § 34-528; Acts 2003, No. 1185, § 226; 2011, No. 695, § 1.

16-108-228. Appeals.

(a) An appeal may be taken from:

(1) An order denying a motion to compel arbitration;

(2) An order granting a motion to stay arbitration;

(3) An order confirming or denying confirmation of an award;

(4) An order modifying or correcting an award;

(5) An order vacating an award without directing a rehearing; or

(6) A final judgment entered under this subchapter.

(b) An appeal under this section must be taken as from an order or a judgment in a civil action.

History. Acts 1969, No. 260, § 19; A.S.A. 1947, § 34-529; Acts 2011, No. 695, § 1.

RESEARCH REFERENCES

ALR. Adoption of manifest disregard of law standard as nonstatutory ground to review arbitration awards governed by Uniform Arbitration Act (UAA). 14 A.L.R.6th 491.

CASE NOTES

Appealable Orders.

Appellate court overruled the credit card customer's assertion that the appellate court had no jurisdiction to review the denial of the bank's petition and application to confirm the arbitration award against the customer, because the bank was appealing from the denial of its petition to confirm the arbitration award, not from the denial of its motion for summary judgment. MBNA Am. Bank, N.A. v. Blanks, 100 Ark. App. 8, 262 S.W.3d 618 (2007).

Cited: Wyatt v. Giles, 95 Ark. App. 204,

35 S.W.3d 552 (2006); Sterne, Agee & Leach, Inc. v. Way, 101 Ark. App. 23, 270 S.W.3d 369 (2007).

16-108-229. Relationship to Electronic Signatures in Global and National Commerce Act.

The provisions of this subchapter governing the legal effect, validity, and enforceability of electronic records or electronic signatures, and of contracts performed with the use of such records or signatures, conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 et seq.

History. Acts 2011, No. 695, § 1.

16-108-230. Savings clause — Certain actions excluded.

(a) This subchapter does not affect an action or proceeding commenced or a right accrued before this subchapter takes effect.

(b) This subchapter does not apply to:

(1) Personal injury or tort matters;

(2) Employer-employee disputes; or

(3) An insured or beneficiary under any insurance policy or annuity contract.

History. Acts 1969, No. 260, § 20; A.S.A. 1947, § 34-530; Acts 2011, No. 695, § 1.

CHAPTER 110

ATTACHMENT AND GARNISHMENT

Subchapter 4 — Garnishment Proceedings

16-110-401. Grounds.

RESEARCH REFERENCES

Ark. L. Rev. Note, Vanished in the Blink of an Eye: Split-Second Garnishment Liability and Loan Manager Accounts in the Wake of In re Southwestern Glass, 58 Ark. L. Rev. 893.

16-110-407. Failure of garnishee to answer.

CASE NOTES

Analysis

Appeals.
Liability upon Default.

Appeals.

Employer, as garnishee, was required to withhold only $1,086.37 from the employee's wages under this section and Wash. Rev. Code § 6.27.200 as both parties conceded the proper amount owed to the insurer was $1,086.37, not $11.523.39 listed in the default judgment; to allow the insurer's collection of entire amount owed before reduction would be inequitable. Nationwide Ins. Enter. v. Ibanez, 368 Ark. 432, 246 S.W.3d 883 (2007).

Liability upon Default.

Trial court erred in entering a writ of garnishment against an employer in the amount the employer owed at the time of service of the writ, plus the amount of nonexempt wages earned through the date of judgment, because this section specifically limited a defaulting garnishee's liability to the amount of nonexempt wages held at the time of service of the writ of garnishment. Wal-Mart Stores, Inc. v. D.A.N. Joint Venture III L.P., 374 Ark. 489, 288 S.W.3d 627 (2008).

CHAPTER 111

DECLARATORY JUDGMENTS

16-111-101. Definition.

CASE NOTES

Applicability.

Petition for declaratory relief was denied as the individual's petition sought a declaration that her son, who witnessed his sister's death following an accident with the driver, could bring a claim for emotional damages; the Declaratory Judgment Act was not appropriate simply to determine whether a cause of action existed. Hardy v. United Servs. Auto. Ass'n, 95 Ark. App. 48, 233 S.W.3d 165 (2006).

16-111-102. Legislative declaration — Purpose — Construction.

CASE NOTES

Cited: Hardy v. United Servs. Auto. Ass'n, 95 Ark. App. 48, 233 S.W.3d 165 (2006); McAlmont Suburban Sewer Improvement Dist. No. 242 v. McCain-Hwy. 161, 99 Ark. App. 431, 262 S.W.3d 185 (2007); Statewide Outdoor Adver., LLC v. Town of Avoca, 104 Ark. App. 10, 289 S.W.3d 111 (2008).

16-111-103. Power of courts to declare rights, status, etc. — Form of declaration.

RESEARCH REFERENCES

ALR. What Constitutes Plain, Speedy, and Efficient State Remedy Under Tax Injunction Act (28 USCS § 1341), Prohibiting Federal District Courts from Interfering with Assessment, Levy, or Collection of State Business Taxes. 31 A.L.R. Fed. 2d 237.

CASE NOTES

Analysis

In General.
Federal Jurisdiction.

In General.

Where the legal description for a mortgage only specifically listed one of two lots, the mortgagee's claim that the proper interpretation of the mortgage was that it included both lots was not procedurally barred by § 18-50-116(d)(2)(B) as (1) this section gave courts the power to declare rights, status, and other legal relations whether or not relief was or could have been claimed, (2) § 16-111-104 provided that the mortgagee could obtain a declaration of its rights under the mortgage, and (3) because no third parties were involved, no individuals not a party to the action were prejudiced by allowing the mortgagee to proceed in obtaining an interpretation of the mortgage. Acuff v. CitiMortgage, Inc., — F. Supp.2d —, 2006 U.S. Dist. LEXIS 67978 (E.D. Ark. Sept. 21, 2006).

Federal Jurisdiction.

Giving a broad construction to the Tax Injunction Act's (TIA), 28 U.S.C.S. § 1341, use of "tax," access and hook-up fees for new installations of water and sewer services qualified as taxes for purposes of the TIA. Because homebuilders' action was to enjoin the assessment and collection of taxes, and because the homebuilders had a plain, speedy, and efficient remedy in the state courts via § 16-113-306 and this section, the TIA barred federal jurisdiction over the illegal exaction claims based on Ark. Const., Art. 16, § 13 against a city, a utility, and a water and sewer commission, raised by the homebuilders. Northwest Ark. Home Builders Ass'n v. City of Rogers, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 19772 (W.D. Ark. Mar. 3, 2008).

Cited: Hardy v. United Servs. Auto. Ass'n, 95 Ark. App. 48, 233 S.W.3d 165 (2006).

16-111-104. Right to determination generally.

CASE NOTES

Analysis

In General.
Insurance Contracts.
Justiciable Controversy.
Mortgages.
Municipal Ordinances.
Rights of Third Parties.

In General.

In a City's challenge to the County Assessor's allocation of millage rates, the matter was appropriate for declaratory judgment as it involved questions that directly affected an existing bond issue and presented a justiciable issue for the trial court to decide. City of Fayetteville v. Wash. County, 369 Ark. 455, 255 S.W.3d 844 (2007).

Summary judgment was properly awarded to the State of Arkansas and a prosecuting attorney on petitioner's complaint for a declaratory judgment that a statute was unconstitutional because petitioner was not in custody; because petitioner was on probation, and therefore not in custody, petitioner was not entitled to any postconviction relief. Neely v. McCastlain, 2009 Ark. 189, 306 S.W.3d 424 (2009).

Insurance Contracts.

Summary judgment was properly granted in a declaratory judgment action as it related to an intentional act exclusion in a homeowner's policy because a negligence lawsuit brought by an injured party was based upon injuries caused by the unexpected result of an insured's intentional act of shooting a gun. However, there was ambiguity in the language of a general liability exclusion; therefore, summary judgment was precluded because it was susceptible to more than one reason-

able construction. Parker v. Southern Farm Bureau Cas. Ins. Co., 104 Ark. App. 301, 292 S.W.3d 311 (2009).

Justiciable Controversy.

Declaratory relief was proper in appellants' action to have the Arkansas Check-Cashers Act declared unconstitutional because a justiciable controversy was present between appellants and the Arkansas State Board of Collection Agencies as to the implementation, application, and effect of the Act. McGhee v. Ark. State Bd. of Collection Agencies, 375 Ark. 52, 289 S.W.3d 18 (2008).

Circuit court did not err in denying declaratory relief to a tobacco products manufacturer where it sought declaratory relief on events only hypothetical in nature and, therefore, the manufacturer lacked standing because no justiciable controversy existed. McLane Southern, Inc. v. Ark. Tobacco Control Bd., 2010 Ark. 498, — S.W.3d — (2010).

Mortgages.

Where the legal description for a mortgage only specifically listed one of two lots, the mortgagee's claim that the proper interpretation of the mortgage was that it included both lots was not procedurally barred by § 18-50-116(d)(2)(B) as (1) § 16-111-103 gave courts the power to declare rights, status, and other legal relations whether or not relief was or could have been claimed, (2) this section provided that the mortgagee could obtain a declaration of its rights under the mortgage, and (3) because no third parties were involved, no individuals not a party to the action were prejudiced by allowing the mortgagee to proceed in obtaining an interpretation of the mortgage. Acuff v. CitiMortgage, Inc., — F. Supp.2d —, 2006 U.S. Dist. LEXIS 67978 (E.D. Ark. Sept. 21, 2006).

Municipal Ordinances.

Motion to dismiss for failure to state a claim was improperly granted because a complaint filed by a lessor and a lessee sufficiently alleged that their rights or other legal relations were affected by Avoca, Ark., Ordinance No. 69 where a town was making demands regarding the removal of billboards; therefore, the lessor and the lessee were entitled to declaratory relief under this section. They were arguing that the town lacked power to regulate the billboards at issue. Statewide Outdoor Adver., LLC v. Town of Avoca, 104 Ark. App. 10, 289 S.W.3d 111 (2008).

Rights of Third Parties.

In a property owner's suit to decide which of two public entities had the right to set a sewer connection fee, the owner had standing to seek a declaratory judgment because: (1) the owner was a beneficiary of a contract between the entities, and (2) under this section, any person (even a non-beneficiary) whose legal relations were affected by a contract could obtain a declaration of legal relations under the contract. McAlmont Suburban Sewer Improvement Dist. No. 242 v. McCain-Hwy. 161, 99 Ark. App. 431, 262 S.W.3d 185 (2007).

Cited: Weaver v. Collins, 2010 Ark. App. 707, — S.W.3d — (2010).

16-111-106. Parties.

CASE NOTES

Analysis

In General.
Parties in Interest.

In General.

Declaratory relief was not the proper mechanism to determine if an individual's son had a claim for emotional distress after witnessing the death of his sister, who was involved in an accident with the driver, the insurer's insured, as the relationship between the insurer and the insured had no bearing the potential claim by the individual's son. Hardy v. United Servs. Auto. Ass'n, 95 Ark. App. 48, 233 S.W.3d 165 (2006).

Parties in Interest.

State of Arkansas, through the Arkansas Attorney General and the Prosecuting Attorney for the State of Arkansas, had standing to appeal the dismissal of school district's action for the implementation of an additional levy of 7.55 mills because the state had been named as a party and a

constitutional question was at issue. Beebe v. Fountain Lake Sch. Dist., 365 Ark. 536, 231 S.W.3d 628 (2006).

Where child's biological father was denied the right to consent to his child's adoption and claimed that the Arkansas adoption statutes violated his right to due process, the state had a right to intervene. Escobedo v. Nickita, 365 Ark. 548, 231 S.W.3d 601 (2006).

Cited: Osborne v. Bekaert Corp., 97 Ark. App. 147, 245 S.W.3d 185 (2006); Parker v. Southern Farm Bureau Cas. Ins. Co., 104 Ark. App. 301, 292 S.W.3d 311 (2009).

16-111-107. Jury trial.

CASE NOTES

Cited: Crawford v. Cashion, 2010 Ark. 124, — S.W.3d — (2010).

16-111-109. Review.

CASE NOTES

Cited: Poff v. Peedin, 2010 Ark. App. 365, — S.W.3d — (2010).

16-111-111. Costs.

CASE NOTES

Costs Awarded.

Statutory attorney's fees under § 16-22-308 were not available in an action brought under the Declaratory Judgment Act; however, costs were available under this section. Hanners v. Giant Oil Co. of Ark., Inc., 373 Ark. 418, 284 S.W.3d 468 (2008).

CHAPTER 112

HABEAS CORPUS

Subchapter 1 — Appeals — New Scientific Evidence

16-112-102. Officers permitted to issue.

CASE NOTES

Federal Habeas Relief.

Although the filing of state habeas corpus petitions pursuant to subdivision (a)(1) of this section qualified for statutory tolling under 28 U.S.C.S. § 2244(d)(2), such petitions still had to be properly filed. Petitioner inmate's first two state habeas petitions did not have the effect of statutorily tolling the one year statute of limitations set out in § 2244(d)(1)(A) because they were not "properly filed," as they were filed in the wrong state circuit court, but his third habeas petition did statutorily toll the limitations period while the habeas proceedings were pending because that third habeas petition was properly and timely filed in the correct state court. Ben-Yah v. Norris, 570 F. Supp. 2d 1086 (E.D. Ark. 2008).

16-112-103. Petition.

CASE NOTES

Analysis

Actual Innocence.
Denial of Petition.
Petition Denied Without Hearing.
Jurisdiction.

Actual Innocence.

Where appellant gave the police a statement in which he admitted shooting the murder victim, appellant failed to show that DNA testing of blood splatter would have proved that he was actually innocent of the crime as required by subdivision (a)(1) of this section. The trial court did not err by denying his petition to vacate or set-side judgment pursuant to § 16-112-201 et seq. Leaks v. State, 371 Ark. 581, 268 S.W.3d 866 (2007).

Denial of Petition.

In a capital murder case, as defendant failed to show the conviction was invalid on its face or that the trial court lacked jurisdiction, the trial court properly denied his petition for writ of habeas corpus; defendant's assertion that his guilty plea was invalid should have been raised in a motion for postconviction relief under Ark. R. Crim. P. 37.1 as this issue required the kind of factual inquiry that went beyond the facial validity of the commitment. Friend v. Norris, 364 Ark. 315, 219 S.W.3d 123 (2005).

Where the trial court accepted appellant's plea for capital-felony murder on a Sunday in violation of § 16-10-114, the statutory violation did not affect the trial court's jurisdiction over the matter; further, a petition for writ of habeas corpus was not the proper method with which to claim a statutory violation, rather, appellant's argument should have been raised on direct appeal. Noble v. Norris, 368 Ark. 69, 243 S.W.3d 260 (2006).

Circuit court did not err in dismissing the inmate's petition for habeas corpus where although the inmate's original judgment and commitment order was erroneous, the sentencing court had jurisdiction to amend the order to reflect the correct statute; the inmate failed to show that commitment was invalid and did not establish habeas corpus under § 16-112-103. Baker v. Norris, 369 Ark. 405, 255 S.W.3d 466 (2007).

Where appellant was denied habeas relief and his appeal was dismissed, he stated no valid reason for the court to grant his motion for reconsideration. Appellant's constitutional challenge arising from the alleged invalidity of his arrest did not result in an invalid conviction and required a factual inquiry that was improper in a habeas proceeding under subdivision (a)(1) of this section; appellant made only a general due process argument that he was unlawfully imprisoned, and cited no authority for the proposition that his sentence was illegal. Russell v. Norris, 2009 Ark. 472, — S.W.3d — (2009).

Petition Denied Without Hearing.

Trial court did not err in denying a prisoner's petition for habeas corpus without an evidentiary hearing because the prisoner failed to demonstrate that his attempted murder conviction was facially invalid or that the trial court was without jurisdiction. His claim that he was not competent to stand trial could have been raised in the original trial or appeal. Henderson v. State, 2010 Ark. 30, — S.W.3d — (2010).

Jurisdiction.

Inmate's pro se petition seeking release under subsection (a) of this section could not be granted by the circuit court in which he filed his motion for postconviction relief because the inmate was not in custody in that court's jurisdiction. Hill v. State, 2010 Ark. 102, — S.W.3d — (2010).

Cited: Davis v. State, 366 Ark. 401, 235 S.W.3d 902 (2006); Carter v. Norris, 367 Ark. 360, 240 S.W.3d 124 (2006).

16-112-105. Form of writ.

CASE NOTES

Jurisdiction.

Where appellant was incarcerated in Lee County, Arkansas, for rape and burglary, the Circuit Court of Hot Spring County did not have personal jurisdiction to issue a writ of habeas corpus for his release under § 16-112-105. The circuit court did not err when it declined to grant relief on appellant's motion for reconsideration. Lukach v. State, 369 Ark. 475, 255 S.W.3d 832 (2007).

Subchapter 2 — Other Relief — New Scientific Evidence

16-112-201. Writ of Habeas Corpus — New scientific evidence.

CASE NOTES

Analysis

In General.
Applicability.
Procedure.
Scientific Evidence.

In General.

Because habeas petitioner had not sought postjudgment relief from the circuit court on the basis that he had been denied due process of law by the court's alleged failure to follow several procedural requirements, including delivering a copy of the petition to the prosecuting attorney and to the Attorney General, the Court was precluded from addressing the appeal as the due-process claims were not preserved for appellate review. Randall v. State, 368 Ark. 279, 244 S.W.3d 662 (2006).

Applicability.

Where the Arkansas Supreme Court reversed the denial of defendant's petition for postconviction relief seeking to retest certain DNA evidence and ordered that certain negroid hairs introduced into evidence be retested, but on remand the trial court instead entered an order finding that the state had complied with the requirement because the hairs had been retested in preparation for the second trial, the trial court had complied with the Supreme Court's mandate. Johnson v. State, 366 Ark. 390, 235 S.W.3d 872 (2006).

Procedure.

Inmate's requests for scientific testing were barred by his previous petitions under the law of the case doctrine. Hill v. State, 2010 Ark. 102, — S.W.3d — (2010).

Scientific Evidence.

Defendant's petition did not comport with the prevailing rules of procedure and his appeal was dismissed as he merely concluded that he was innocent and wished to have testing performed to prove that fact; defendant failed to state the basis for proving his innocence with scientific testing, identify the evidence to be tested and specify the scientific tests to be conducted on the evidence, and he made no showing that good cause prevented him from filing his petition within 36 months from the date of his conviction. Douthitt v. State, 366 Ark. 579, 237 S.W.3d 76 (2006).

Where appellant gave the police a statement in which he admitted shooting the murder victim, appellant failed to show that DNA testing of blood splatter would have proved that he was actually innocent of the crime as required by § 16-112-103(a)(1). The trial court did not err by denying his petition to vacate or set-side the judgment pursuant to § 16-112-201 et seq. Leaks v. State, 371 Ark. 581, 268 S.W.3d 866 (2007).

Cited: Davis v. State, 366 Ark. 401, 235 S.W.3d 902 (2006); Aaron v. State, 2010 Ark. 249, — S.W.3d — (2010).

16-112-202. Form of motion.

CASE NOTES

Analysis

Applicability.
Petition Denied and Dismissed.
Postconviction DNA Testing.
Prima Facie Case.
Scientific Testing.

Applicability.

Defendant's petition did not comport with the prevailing rules of procedure and his appeal was dismissed as he merely concluded that he was innocent and wished to have testing performed to prove that fact; defendant failed to state the basis for proving his innocence with scientific testing, identify the evidence to be tested and specify the scientific tests to be conducted on the evidence, and he made no showing that good cause prevented him from filing his petition within 36 months from the date of his conviction.Douthitt v. State, 366 Ark. 579, 237 S.W.3d 76 (2006).

Pursuant to subdivision (10) of this section, defendant's petition for writ of habeas corpus and motion for testing was not timely; defendant's requests for testing did not point to any new technology that was more probative than what was available at trial and each of the items that he sought to have tested was available at the time of his trial. Scott v. State, 372 Ark. 587, 279 S.W.3d 66 (2008).

Petition Denied and Dismissed.

Defendant's motion for scientific testing was properly denied because the motion was filed almost 16 years after the judgment was entered, but defendant failed to establish in the motion a rebuttal of the presumption arising from one of the five grounds listed in subdivision (10) of this section; the record did not support defendant's claim that he alleged his incompetence in the motion for testing or the proposed amendments and neither the motions nor the proposed amendments referenced the presumption against timeliness, any cause for delay, or incompetence of any kind. Defendant did not identify newly discovered evidence to be tested and failed to clearly identify the evidence that he did wish to be tested and, despite defendant's assertion, he did not include in the motion a showing that a new method of technology was available that was substantially more probative than prior testing. Aaron v. State, 2010 Ark. 249, — S.W.3d — (2010).

Postconviction DNA Testing.

Where appellant gave the police a statement in which he admitted shooting the murder victim, the trial court did not err by denying his petition to vacate or set-side judgment pursuant to § 16-112-201 et seq. Appellant could not prove that the identity of the perpetrator was at issue during the investigation or prosecution of the offense, as required by subdivision (7) of this section. Leaks v. State, 371 Ark. 581, 268 S.W.3d 866 (2007).

Appellant's motion for retesting of DNA on a sock he used to clean himself with after raping a 15-year-old girl was properly denied because appellant failed to satisfy the predicate requirement for such retesting: that his identity have been at issue, as required by subdivision (7) of this section. The victim and other evidence clearly identified appellant as the only possible rapist. Strong v. State, 2010 Ark. 181, — S.W.3d — (2010).

Prima Facie Case.

Inmate's motion for scientific testing was properly denied by the trial court because the motion was not made within 36 months of defendant's original conviction and the inmate had not provided any evidence to rebut the presumption that the petition was not timely; there was no showing that incompetence contributed to the delay, that the evidence to be tested was newly discovered, or that a new method of technology was available. Brown v. State, 367 Ark. 315, 239 S.W.3d 481 (2006).

Scientific Testing.

Prisoner's petition to vacate and set aside the judgment against him was properly denied as the petition failed to identify a generally accepted scientific testing method that would have produced new and non-cumulative evidence materially relevant to prisoner's assertion of actual innocence; the prisoner failed to reveal in

his pleadings a generally accepted scientific method that could have proved that the victims were virgins after July 12, 1997, based on blood, tissue, or other samples taken nearly a decade later and, by the prisoner's own admission, the requested scientific testing would have merely duplicated medical records in existence at the time of his conviction. Davis v. State, 366 Ark. 401, 235 S.W.3d 902 (2006).

In a capital murder case, denial of the petitioner's motion for habeas relief was proper as he failed to meet his burden of demonstrating entitlement to additional scientific testing of fingerprints obtained at the crime scene pursuant to subdivisions (3) and (8) of this section. The petitioner failed to demonstrate that utilizing the Automated Fingerprint Identification System (AFIS) constituted a new testing method, or that its use was substantially more probative than the prior testing, as both involved identification on fingerprints; and assuming that the unidentified latent fingerprint taken from the scope of the gun matched a fingerprint in the AFIS database, that finding would not have negated or altered the two positive identifications of the petitioner's fingerprints made by fingerprint experts. Davis v. State, — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 603 (Nov. 8, 2007).

State inmate's federal habeas claim that the state courts violated his federal constitutional rights to due process and to present a complete defense by denying his postconviction petition to require additional fingerprint testing of the gun found near victim's body pursuant to the new state habeas cause of action under subdivision (c)(1)(B) of this section was procedurally barred because the inmate raised no issue of federal constitutional law and cited no federal authority in the state courts, and even if it had been raised, the inmate cited no Supreme Court decision clearly establishing that the right to present a complete defense applies to postconviction proceedings, or that due process includes the right to postconviction testing using new technological advances; the district court also did not abuse its discretion by not ordering the fingerprint testing he requested under R. Governing § 2254 Cases U.S. Dist. Cts. 6(a) because the federal claim was procedurally barred, and the state courts' decision that the inmate failed to show "more than a slight chance" that additional testing would yield a favorable result was not based on an unreasonable determination of the facts. Rucker v. Norris, 563 F.3d 766 (8th Cir. 2009), cert. denied, — U.S. —, 130 S. Ct. 401, 175 L. Ed. 2d 275 (2009).

Petitioner seeking scientific testing of crime evidence from his 21-year-old rape conviction did not offer a factual basis for his claim that the evidence was available with an unbroken chain of custody as required by subdivision (b)(2) of this section; therefore, the trial court did not err in finding that his petition was a successive petition and subject to summary denial under § 16-112-205(d). Carter v. State, 2010 Ark. 29, — S.W.3d — (2010).

16-112-203. Contents of motion.

CASE NOTES

In General.

Because habeas petitioner had not sought postjudgment relief from the circuit court on the basis that he had been denied due process of law by the court's alleged failure to follow several procedural requirements, including delivering a copy of the petition to the prosecuting attorney and to the Attorney General, the Court was precluded from addressing the appeal as the due-process claims were not preserved for appellate review. Randall v. State, 368 Ark. 279, 244 S.W.3d 662 (2006).

Defendant's petition did not comport with the prevailing rules of procedure and his appeal was dismissed as he merely concluded that he was innocent and wished to have testing performed to prove that fact; defendant failed to state the basis for proving his innocence with scientific testing, identify the evidence to be tested and specify the scientific tests to be conducted on the evidence, and he made no showing that good cause prevented him from filing his petition within 36 months from the date of his conviction. Douthitt v. State, 366 Ark. 579, 237 S.W.3d 76 (2006).

Cited: Davis v. State, 366 Ark. 401, 235 S.W.3d 902 (2006).

16-112-204. Other pleadings.

CASE NOTES

In General.

Because habeas petitioner had not sought postjudgment relief from the circuit court on the basis that he had been denied due process of law by the court's alleged failure to follow several procedural requirements, including delivering a copy of the petition to the prosecuting attorney and to the Attorney General, the Court was precluded from addressing the appeal as the due-process claims were not preserved for appellate review. Randall v. State, 368 Ark. 279, 244 S.W.3d 662 (2006).

While there was a mandatory response requirement in subsection (a) of this section for habeas corpus petitions seeking the scientific testing of crime evidence, there was no provision for a default judgment as in Ark. R. Civ. P. 55, and the trial court did not err in denying a petitioner's motion for a default judgment. The rules of civil procedure did not apply in the habeas proceeding. Carter v. State, 2010 Ark. 29, — S.W.3d — (2010).

16-112-205. Hearing.

CASE NOTES

Denial of Petition Without Hearing.

Petitioner seeking scientific testing of crime evidence from his 21-year-old rape conviction did not offer a factual basis for his claim that the evidence was available with an unbroken chain of custody as required by § 16-112-202(b)(2); therefore, the trial court did not err in finding that his petition was a successive petition and subject to summary denial under subsection (d) of this section. Carter v. State, 2010 Ark. 29, — S.W.3d — (2010).

Defendant was entitled to an evidentiary hearing, as required under this section, on a motion for new trial, brought under the Arkansas DNA testing statutes, §§ 16-112-201 to 16-112-208, because the petition, the file, and the records of the proceeding did not conclusively show that defendant was entitled to no relief. Echols v. State, 2010 Ark. 417, — S.W.3d — (2010).

16-112-207. Appointment of counsel — Latent fingerprinting services.

CASE NOTES

In General.

Because habeas petitioner had not sought postjudgment relief from the circuit court on the basis that he had been denied due process of law by the court's alleged failure to follow several procedural requirements, including delivering a copy of the petition to the prosecuting attorney and to the Attorney General, the Court was precluded from addressing the appeal as the due-process claims were not preserved for appellate review. Randall v. State, 368 Ark. 279, 244 S.W.3d 662 (2006).

Cited: Davis v. State, 366 Ark. 401, 235 S.W.3d 902 (2006); Douthitt v. State, 366 Ark. 579, 237 S.W.3d 76 (2006).

16-112-208. Testing procedures.

CASE NOTES

Analysis

Conclusive Results.
Motion for New Trial.
No Constitutional Right.
Relief Properly Denied.

Conclusive Results.

Where it was undisputed that the results of a DNA test conclusively excluded three codefendants as the source of the DNA evidence tested, subsection (b) of this section was inapplicable and the trial court erred in denying one defendant's motion for new trial under that subsection. Echols v. State, 2010 Ark. 417, — S.W.3d — (2010).

Motion for New Trial.

Where defendant was convicted on three counts of capital murder and sentenced to death, subdivision (e)(3) of this section did not require defendant to present a compelling claim of actual innocence on a motion for new trial, brought under the Arkansas DNA testing statutes, §§ 16-112-201 to 16-112-208, but stated that defendant had to establish by compelling evidence that a new trial would result in an acquittal. Echols v. State, 2010 Ark. 417, — S.W.3d — (2010).

No Constitutional Right.

Court rejected defendant's argument that he had a constitutional right to additional testing under the due process clause of Ark. Const. Art. 2, § 8. When DNA test results matched the person requesting additional testing, it was not fundamentally unfair to refuse additional testing. Isom v. State, 2010 Ark. 496, — S.W.3d — (2010), cert. denied, Isom v. Arkansas, — U.S. —, — S. Ct. —, — L. Ed. 2d —, 2011 U.S. LEXIS 4749 (U.S. June 20, 2011).

Relief Properly Denied.

Circuit court did not abuse its discretion in denying defendant's postconviction request for additional DNA testing under subsection (b) of this section as an earlier postconviction DNA test did not exclude him as the source of the DNA evidence and further testing of third parties would not conclusively eliminate him as the source. Isom v. State, 2010 Ark. 496, — S.W.3d — (2010), cert. denied, Isom v. Arkansas, — U.S. —, — S. Ct. —, — L. Ed. 2d —, 2011 U.S. LEXIS 4749 (U.S. June 20, 2011).

CHAPTER 113

INJUNCTIONS

Subchapter 3 — Grant

16-113-306. Illegal or unauthorized taxes and assessments enjoined.

RESEARCH REFERENCES

ALR. What Constitutes Plain, Speedy, and Efficient State Remedy Under Tax Injunction Act (28 USCS § 1341), Prohibiting Federal District Courts from Interfering with Assessment, Levy, or Collection of State Business Taxes. 31 A.L.R. Fed. 2d 237.

CASE NOTES

Federal Jurisdiction.

Giving a broad construction to the Tax Injunction Act's (TIA), 28 U.S.C.S. § 1341, use of "tax," access and hook-up fees for new installations of water and sewer services qualified as taxes for purposes of the TIA. Because homebuilders' action was to enjoin the assessment and collection of taxes, and because the homebuilders had a plain, speedy, and efficient remedy in the state courts via this section and § 16-111-103, the TIA barred federal jurisdiction over the illegal exaction claims based on Ark. Const., Art. 16, § 13 against a city, a utility, and a water and sewer commission, raised by the homebuilders. Northwest Ark. Home Builders Ass'n v. City of Rogers, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 19772 (W.D. Ark. Mar. 3, 2008).

CHAPTER 114

MALPRACTICE ACTIONS

Subchapter 2 — Actions for Medical Injury

16-114-201. Definitions.

RESEARCH REFERENCES

Ark. L. Rev. Note, To Truly Reform We Must Be Informed: Davis v. Parham, the Separation of Powers Doctrine, and the Constitutionality of Tort Reform in Arkansas, 59 Ark. L. Rev. 781.

CASE NOTES

Medical Injury.

Husband's claims against a psychiatrist, a psychologist, and a clinic fell within the purview of the Arkansas Medical Malpractice Act as the claims involved the failure to properly diagnose, assess, and manage his wife's care and treatment. Dodd v. Sparks Reg'l Med. Ctr., 90 Ark. App. 191, 204 S.W.3d 579 (2005).

16-114-202. Applicability.

CASE NOTES

Medical Injury.

Husband's claims against a psychiatrist, a psychologist, and a clinic fell within the purview of the Arkansas Medical Malpractice Act as the claims involved the failure to properly diagnose, assess, and manage his wife's care and treatment. Dodd v. Sparks Reg'l Med. Ctr., 90 Ark. App. 191, 204 S.W.3d 579 (2005).

16-114-203. Statute of limitations.

RESEARCH REFERENCES

ALR. Timeliness of action under medical malpractice statute of repose, aside from effect of fraudulent concealment of patient's cause of action. 14 A.L.R.6th 301.

Ark. L. Rev. Note, To Truly Reform We Must Be Informed: Davis v. Parham, the

Separation of Powers Doctrine, and the Constitutionality of Tort Reform in Arkansas, 59 Ark. L. Rev. 781.

CASE NOTES

Analysis

Actions Barred.
Discovery of Foreign Objects.
Fraudulent Concealment.
Tolling of Statute.

Actions Barred.

Order dismissing executor's complaint alleging medical malpractice in the care and treatment of his mother prior to her death was affirmed because the executor of her estate had been discharged as executor before he sued, so the first complaint was a nullity, and the new complaint was not filed before the expiration of the applicable statute of limitations. Johnson v. Greene Acres Nursing Home Ass'n, 364 Ark. 306, 219 S.W.3d 138 (2005).

Motion to set aside a default judgment in a medical malpractice case should have been granted as the patient lacked standing to pursue the claim based on the fact that she had filed bankruptcy; moreover, the statute of limitations had run when she filed a motion to substitute a bankruptcy trustee as a party. Fields v. Byrd, 96 Ark. App. 174, 239 S.W.3d 543 (2006).

Wrongful-death and survival action brought by the administratrix of the decedent's estate against the medical center was time-barred under this section as the order appointing the administratrix was not effective until it was filed almost two weeks after the complaint was filed, thereby making the complaint a nullity. Hubbard v. Nat'l Healthcare of Pocahontas, Inc., 371 Ark. 444, 267 S.W.3d 573 (2007).

Trial court did not err by granting the doctors' summary judgment because the medical malpractice action was not properly filed within the two-year statute of limitations of subsection (a) of this section. The trial court did not err in holding that the November 3, 2009 order of substitution of parties was ineffective and therefore the action was barred by the statute of limitations because: (1) the wrongful death complaint filed by the patient's daughter and husband in April 2009 was a nullity because four siblings of the patient were omitted as party plaintiffs as required by § 16-62-102(b) and therefore it never existed; (2) the order of substitution of parties that substituted the daughter in her capacity of estate administrator as the party plaintiff did not allege any facts supporting the action and therefore did not constitute an amended complaint; (3) the order of substitution was entered on November 3, 2009, after the statute of limitations had expired as to each doctor in July 2009 and September 2009; and (4) the estate administrator could not establish the first element of the continuous-course-of-treatment doctrine because she could not establish that the doctors provided continuous treatment to the patient up to November 3, 2009. Mendez v. Glover, 2010 Ark. App. 808, — S.W.3d — (2010).

Discovery of Foreign Objects.

Doctor's motion to dismiss the patient's malpractice case was granted where, pursuant to this section, the patient did not provide the Arkansas Supreme Court with authority that would compel a finding that her own ovary should constitute a foreign object, the later discovery of which should toll the running of the statute of limitations. Reed v. Guard, 374 Ark. 1, 285 S.W.3d 662 (2008).

Fraudulent Concealment.

Because a general statute must yield when there is a specific statute involving the particular subject matter, in a minor child's medical malpractice action, the two-year statute of limitations in this section applied rather than the three-year statute of limitation in § 16-56-116. Shelton v. Fiser, 340 Ark. 89, 8 S.W.3d 557 (2000).

Tolling of Statute.

Although the amended complaint in parents' medical malpractice action was filed before the expiration of the two-year statute of limitations, the limitations period was not tolled because a summons

was never issued, and parents admitted they failed to complete service of process of the amended complaint as required by Ark. R. Civ. P. 4; while Ark. R. Civ. P. 3 provides that an action is commenced by filing a complaint with the clerk of the proper court, the effectiveness of the commencement date is dependent upon a party satisfying the requirements of Ark. R. Civ. P. 4(i), which provides that service of process on a defendant must be accomplished within 120 days after the filing of the complaint. Posey v. St. Bernard's Healthcare, Inc., 365 Ark. 154, 226 S.W.3d 757 (2006).

Minority tolling provision of subdivision (c)(1) of this section was inapplicable where the minor at issue was stillborn. Dachs v. Hendrix, 2009 Ark. 542, — S.W.3d — (2009).

16-114-206. Burden of proof.

RESEARCH REFERENCES

Ark. L. Rev. Recent Development: Arkansas Constitutional Law — Arkansas Medical Malpractice Act, 58 Ark. L. Rev. 1005.

Note, To Truly Reform We Must Be Informed: Davis v. Parham, the Separation of Powers Doctrine, and the Constitutionality of Tort Reform in Arkansas, 59 Ark. L. Rev. 781.

CASE NOTES

Analysis

Applicability.
Affidavit.
Expert Testimony.
Informed Consent.
Proximate Cause.
Standard of Care.

Applicability.

Although the United States argued that the current version of this section applied to a medical malpractice suit filed by Arkansas plaintiffs, it did not present any authority showing that the section was intended to apply retroactively. The current version of the section did not apply to plaintiffs' claims because they accrued prior March 25, 2007, which was when the current version took effect. McMullin v. United States, 515 F. Supp. 2d 909 (E.D. Ark. 2007).

Affidavit.

Medical malpractice complaint that was not accompanied by an expert's affidavit was properly dismissed; although plaintiffs alleged that the negligence of the doctor in allowing a sharp instrument to fall into patient's spinal cord was within a jury's comprehension as a matter of general knowledge, the court found that an expert was required for the jury to understand what a cervical diskectomy and fusion was, what instruments were used to perform the procedures, what procedures and risks were involved, and whether the doctor's actions proximately caused the injury alleged by appellants. Robbins v. Johnson, 367 Ark. 506, 241 S.W.3d 747 (2006).

Expert Testimony.

Grant of summary judgment against administratrix in her medical malpractice action was improper because the asserted acts of negligence by the doctor were within a lay jury's comprehension as a matter of common knowledge and expert witnesses were not required. Mitchell v. Lincoln, 93 Ark. App. 366, 219 S.W.3d 686 (2005), aff'd, 366 Ark. 592, 237 S.W.3d 455 (2006).

Medical expert could testify in a medical malpractice suit because plaintiffs presented evidence showing that Atlanta, Georgia, where the expert practiced, was similar to the rural Arkansas locality where their deceased son was treated: (1) pursuant to the former version of this section, the expert could testify as to the applicable standard of care only if he engaged in a similar medical speciality and practiced in a locality that was similar to the one where the son was treated; (2) both the expert and the son's treating

physician were board certified pediatricians; and (3) the expert's deposition testimony and supplemental affidavit sufficiently established the similarity of the localities because he stated that the same diagnostic services were available to both himself and the son's treating physician, except for one specialized test that was not necessary to diagnose the son's infective bacterial endocarditis, and that the son would have been properly diagnosed if the treating physician had ordered some of those basic diagnostic tests to be performed. McMullin v. United States, 515 F. Supp. 2d 909 (E.D. Ark. 2007).

In a patient's medical malpractice suit, summary judgment in favor of her surgeon and the hospital was proper as the patient's allegations regarding her surgery were not matters of common knowledge, and she failed to provide expert testimony pursuant to this section so that the jury could evaluate her claims; absent testimony supporting her allegations, she had no proof of the standard of care, deviation, or proximate cause. Similarly, the care reasonably required by the hospital regarding the patient's staph infection and wound complications were not within the common knowledge of most jurors and needed expert testimony. Taylor v. Landherr, 101 Ark. App. 279, 275 S.W.3d 656 (2008).

Summary judgment was properly awarded to a physician in a patient's medical malpractice action where the patient failed to identify an expert witness; the patient had a significant amount of time to identify a medical expert to support the claims but failed to do so. Neal v. Farris, 101 Ark. App. 375, 278 S.W.3d 129 (2008), review denied, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 573 (Sept. 4, 2008).

Although the representative argued that she needed no expert testimony because it was common knowledge that a feeding tube was misplaced if it was in a patient's lung instead of her stomach, to fully understand the standard of care and the allegations of negligence against these doctors, the fact-finder would require an understanding of medical terminology and anatomy as well as medical protocol, such as what an attending physician or radiologist must do upon learning of a mis-positioned feeding tube and what information one physician must impart to another; thus, the representative had to produce expert testimony to assist the fact-finder. Lee v. Martindale, 103 Ark. App. 36, 286 S.W.3d 169 (2008).

Where the patient alleged that a doctor and a medical center's nursing staff were negligent in connection with a fall she sustained while a patient at the medical center, the trial court did not err by denying the patient's proffered instruction that would have allowed the jury to consider the testimony of her physician expert on the standard of care for the nursing staff; the physician was never qualified as an expert on nursing. Furthermore, the patient did not appeal the circuit judge's ruling that subsection (a) of this section controlled the admissibility of the doctor's testimony as to the standard of care for nurses rather than Ark. R. Evid. 702. Nelson v. Stubblefield, 2009 Ark. 256, 308 S.W.3d 586 (2009), rehearing denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 486 (June 25, 2009).

District court did not abuse its discretion by excluding the expert testimony of a nurse because the record reflected that she either had repudiated the conclusions expressed in her written report, or at a minimum, had not developed her conclusions to the point where she could provide a qualified expert opinion at trial. Without expert testimony to support the allegation of negligence against the hospital, as required by this section, the district court acted appropriately in excluding evidence relating to alleged institutional negligence. Csiszer v. Wren, 614 F.3d 866 (8th Cir. 2010).

In a wrongful death action against a physician, the trial court properly granted a directed verdict to the physician based on the locality rule, subsection (a) of this section, because the expert witness provided by an administratrix demonstrated a total lack of knowledge concerning the local medical community, medical facilities, and local standard of care. Gilbow v. Richards, 2010 Ark. App. 780, — S.W.3d — (2010).

Informed Consent.

Where the patient testified that he would not have had surgery to remove part of his bowel had he known that no general surgeon would be in attendance to assist the urologist, it was for the jury to decide whether he gave his informed con-

sent under subdivision (b)(1) of this section; therefore, the trial court erred by granting the urologist a directed verdict in the patient's medical malpractice case. Haupt v. Kumar, 103 Ark. App. 298, 288 S.W.3d 704 (2008).

Proximate Cause.

In a medical malpractice case, where the appellate court remanded a case following entry of a default judgment for a trial on the issue of damages only, the trial court erred in permitting the doctor to introduce evidence regarding proximate causation because proximate causation was an element of liability, not an element of damages. Jones v. McGraw, 374 Ark. 483, 288 S.W.3d 623 (2008).

Standard of Care.

Summary judgment was properly awarded to defendants in husband's wrongful death action under the Arkansas Medical Malpractice Act because, even if husband's expert had been qualified to offer an opinion, his affidavit did not include any statements setting forth the standard of care. Dodd v. Sparks Reg'l Med. Ctr., 90 Ark. App. 191, 204 S.W.3d 579 (2005).

Expert testimony was required for widow's medical malpractice claim as it was not common knowledge that transfusion of a leukemia patient with an allegedly improper blood type could cause injury to the patient and the widow's expert's affidavit was devoid of mention of the standard of care in Baxter County; thus, the widow's affidavit was insufficient to create a question of fact on the issue and the trial court did not err in granting doctor's motion for summary judgment. Mitchell v. Lincoln, 366 Ark. 592, 237 S.W.3d 455 (2006).

Cited: Fryar v. Touchstone Physical Therapy, Inc., 365 Ark. 295, 229 S.W.3d 7 (2006); Newton v. Clinical Reference Lab., 517 F.3d 554 (8th Cir. 2008).

16-114-207. Expert witnesses.

RESEARCH REFERENCES

Ark. L. Rev. Recent Development: Arkansas Constitutional Law — Arkansas Medical Malpractice Act, 58 Ark. L. Rev. 1005.

CASE NOTES

Analysis

Constitutionality.
Qualified to Testify.

Constitutionality.

Patient in a medical malpractice suit argued that her constitutional rights were violated when she was precluded from introducing a physician's original deposition in which the physician testified as the standard of care and the suturing of the patient's bladder during a hysterectomy, but the physician later corrected his statement. The patient failed to show that the patient was prejudiced by the being precluded from introducing the testimony. Crowell v. Barker, 369 Ark. 428, 255 S.W.3d 858 (2007).

In reviewing plaintiff parents' challenge to the validity of subdivision (3) of this section, the court concluded that it was unlikely that the Supreme Court of Arkansas would have accepted either their equal protection argument or separation-of-powers challenge, and the statute had already survived rational basis review. Moreover, any error was harmless as plaintiff had the chance to cross-examine defendant obstetrician on the standard of care after the defendant had taken the stand and testified on direct examination about the proper standard of care, thereby losing the protection of subdivision (3). Csiszer v. Wren, 614 F.3d 866 (8th Cir. 2010).

Qualified to Testify.

District court did not have to decide whether subdivision (3) of this section barred plaintiffs' expert witness from relying on the deposition testimony of a deceased child's treating physician to establish that the localities in which he and the treating physician practiced were similar for purposes of former § 16-114-206(a)(1). The expert's own deposition and

supplemental affidavit were sufficient to establish that the same basic diagnostic services were available to board certified pediatricians in both Atlanta, Georgia, where he practiced and in rural Arkansas, where the treating physician practiced, and that the child would have been properly diagnosed if the treating physician had ordered some basic diagnostic tests to be performed. McMullin v. United States, 515 F. Supp. 2d 909 (E.D. Ark. 2007).

16-114-208. Damage awards — Periodic payment of future damages.

RESEARCH REFERENCES

Ark. L. Rev. Note, To Truly Reform We Must Be Informed: Davis v. Parham, the Separation of Powers Doctrine, and the Constitutionality of Tort Reform in Arkansas, 59 Ark. L. Rev. 781.

16-114-209. False and unreasonable pleadings.

CASE NOTES

Analysis

Constitutionality.
In General.
Insufficient Affidavit.

Constitutionality.

Three days later after patients' claims against healthcare providers were dismissed as untimely, the part of subsection (b) of this section which required dismissal for failure to file a reasonable cause affidavit within thirty days of the filing of the complaint was found to be unconstitutional; court thus held that the patients' should not have to suffer as the last Arkansans harmed by an unconstitutional statute and granted their Fed. R. Civ. P. 59 motion to vacate the order dismissing their claims. Bobo v. Umoh, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 95699 (W.D. Ark. Dec. 28, 2007).

Patient lacked standing to challenge the constitutionality of § 16-114-209(b)(3) were a 30-day time limit was not applied to him; moreover, the patient did not present a convincing argument to overcome the strong presumption of constitutionality applied to the rest of § 16-114-209. A trial court's finding that one portion of such was unconstitutional was moot on appeal due to a finding that a dismissal was appropriate. Childers v. Payne, 369 Ark. 201, 252 S.W.3d 129 (2007).

The constitutional infirmity in § 16-114-209(b) is the provision for dismissal if an affidavit does not accompany a complaint within thirty days; therefore, a decision to dismiss a medical malpractice action for failing to file such an affidavit was reversed on appeal since this conflicted with Ark. R. Civ. P. 3 and Ark. Const. amend. 80, § 3. Summerville v. Thrower, 369 Ark. 231, 253 S.W.3d 415 (2007).

District court's order dismissing a fired worker's medical negligence suit had to be reversed: (1) the district court held that Arkansas law pertaining to medical malpractice suits applied to the worker's negligence suit against a clinical laboratory, a medical review officer, and the officer's employer, who had examined her drug test and had concluded that she had tested positive for drug use; (2) the district court concluded that it was compelled by subdivision (b)(3)(B) of this section, invalidated by Summerville v. Thrower, 369 Ark. 231 (2007), to dismiss the suit with prejudice after the worker failed to timely present an expert affidavit that established reasonable cause for filing an action for medical injury due to negligence; (3) after the district court dismissed the suit, and while the worker's appeal was pending, the Supreme Court of Arkansas, in Summerville, ruled that subdivision (b)(3)(B) of this section was invalid and struck it from the Arkansas Code, thereby rendering the statute a legal nullity; and (4) the Eighth Circuit appeals found it appropriate to exercise its discretion to

address the Summerville decision, even though the worker waited until her reply brief to challenge the statute's validity, because the state supreme court's ruling was determinative of the appeal. Newton v. Clinical Reference Lab., 517 F.3d 554 (8th Cir. 2008).

In General.

Medical malpractice complaint that was not accompanied by an expert's affidavit was properly dismissed; although plaintiffs alleged that the negligence of the doctor in allowing a sharp instrument to fall into patient's spinal cord was within a jury's comprehension as a matter of general knowledge, the court found that an expert was required for the jury to understand what a cervical diskectomy and fusion was, what instruments were used to perform the procedures, what procedures and risks were involved, and whether the doctor's actions proximately caused the injury alleged by appellants. Robbins v. Johnson, 367 Ark. 506, 241 S.W.3d 747 (2006).

Insufficient Affidavit.

In a medical malpractice case against a chiropractor, where a patient failed to file a supplemental affidavit after a trial court held that the first one was too vague to comply with § 16-114-209 due to a failure to describe the expert's familiarity with the standard of care or how the injury was a proximate cause of the failure to perform within that standard, he was unable to argue for a reversal of the decision on appeal since he induced the action. Childers v. Payne, 369 Ark. 201, 252 S.W.3d 129 (2007).

16-114-212. Tolling of the statute of limitations.

CASE NOTES

In General.

Medical malpractice complaint that was not accompanied by an expert's affidavit was properly dismissed; although plaintiffs alleged that the negligence of the doctor in allowing a sharp instrument to fall into patient's spinal cord was within a jury's comprehension as a matter of general knowledge, the court found that an expert was required for the jury to understand what a cervical diskectomy and fusion was, what instruments were used to perform the procedures, what procedures and risks were involved, and whether the doctor's actions proximately caused the injury alleged by appellants. Robbins v. Johnson, 367 Ark. 506, 241 S.W.3d 747 (2006).

Subchapter 3 — Accountants and Attorneys

16-114-303. Liability of attorneys.

CASE NOTES

Analysis

Applicability.
Immunity.

Applicability.

In a negligence action, the real question was whether the property appraiser owed any legal duty to the plaintiff property owners, and the plaintiffs' reliance on §§ 4-86-101, 16-114-303, and 16-22-310 to support their proposition that privity of contract with an appraiser was not a requirement in their negligence suit was misplaced. Marlar v. Daniel, 368 Ark. 505, 247 S.W.3d 473 (2007).

Immunity.

Pursuant to §§ 16-22-310(a)(1) (1999) and 16-114-303, an attorney and law firm were immune from a couple's slander of title claim where there was no privity between the parties, there were no factual assertions of fraud, and it appeared that a lis pendens action to enforce a child arrearage judgment obtained by the hus-

band's ex-wife was simply filed in error. Fleming v. Cox, 363 Ark. 17, 210 S.W.3d 866 (2005).

CHAPTER 116
PRODUCTS LIABILITY

SUBCHAPTER.
1. General Provisions.

Subchapter 1 — General Provisions

SECTION.
16-116-102. Definitions.

16-116-101. Title.

RESEARCH REFERENCES

Ark. L. Rev. Note, To Truly Reform We Must Be Informed: Davis v. Parham, the Separation of Powers Doctrine, and the Constitutionality of Tort Reform in Arkansas, 59 Ark. L. Rev. 781.

U. Ark. Little Rock L. Rev. Note, The Collision of Tort and Contract Law: Validity and Enforceability of Exculpatory Clauses in Arkansas, 28 U. Ark. Little Rock L. Rev. 279.

16-116-102. Definitions.

As used in this subchapter:

(1) "Anticipated life" means the period over which the product may reasonably be expected to be useful to the user as determined by the trier of facts;

(2) "Defective condition" means a condition of a product that renders it unsafe for reasonably foreseeable use and consumption;

(3) "Manufacturer" means the designer, fabricator, producer, compounder, processor, or assembler of any product or its component parts;

(4) "Product" means any tangible object or goods produced, excluding real estate and improvements located thereon. Provided, any tangible object or good produced that is affixed to, installed on, or incorporated into real estate or any improvement thereon shall constitute a product under this subchapter. Provided further, an improvement on real estate shall constitute a product in the event that environmental contaminants exist or have occurred in the improvement;

(5) "Product liability action" includes all actions brought for or on account of personal injury, death, or property damage caused by or resulting from the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging, or labeling of any product;

(6)(A) "Supplier" means any individual or entity engaged in the business of selling a product, whether the sale is for resale or for use or consumption.

(B) "Supplier" includes a retailer, wholesaler, or distributor and also includes a lessor or bailor engaged in the business of leasing or bailment of a product.

(C) "Supplier" shall not include any licensee, as the term is defined in § 17-42-103(10), who is providing only brokerage and sales services under a license; and

(7)(A) "Unreasonably dangerous" means that a product is dangerous to an extent beyond that which would be contemplated by the ordinary and reasonable buyer, consumer, or user who acquires or uses the product, assuming the ordinary knowledge of the community or of similar buyers, users, or consumers as to its characteristics, propensities, risks, dangers, and proper and improper uses, as well as any special knowledge, training, or experience possessed by the particular buyer, user, or consumer or which he or she was required to possess.

(B) However, as to a minor, "unreasonably dangerous" means that a product is dangerous to an extent beyond that which would be contemplated by an ordinary and reasonably careful minor considering his or her age and intelligence.

History. Acts 1979, No. 511, § 2; A.S.A. 1947, § 34-2802; Acts 2007, No. 315, § 1.

Amendments. The 2007 amendment added "excluding real estate ... have occurred in the improvement" at the end of (4), added (6)(C), and made related changes.

CASE NOTES

Analysis

Defective Condition.
Defenses.
Product Liability Action.

Defective Condition.

Vehicle manufacturer was properly granted summary judgment in a driver's product liability suit alleging that injuries he sustained when he struck a tree while driving his vehicle were a result of defects in the air bag and seat belt and that the manufacturer was strictly liable for his injuries because pursuant to §§ 4-86-102(a), 16-116-102(7)(A), the driver had to prove that the product was unreasonably dangerous because of a design or manufacturing defect for which the manufacturer was responsible and he also had to prove that the product was in a defective condition at the time it left the hands of the particular seller, but the driver offered no evidence regarding the existence of a specific defect in the occupant protection system, requiring speculation as to whether it was defective at the time it left the manufacturer's control, and the driver failed to demonstrate liability on the basis of circumstantial evidence because the intricacies of occupant protection systems and their potential design or manufacturing defects were outside the realm of a juror's everyday experience, and there were other potential explanations for the driver's injuries other than a defect for which the manufacturer would be responsible. Ruminer v. GMC, 483 F.3d 561 (8th Cir. 2007).

Defenses.

As a matter of Arkansas law, a plaintiff cannot maintain a products liability action, as defined in subdivision (5) of this section, against the manufacturer of a name-brand prescription drug if the plaintiff consumed only the generic equivalent of that drug. To prevail in such an action, the plaintiff must be able to show that it is more likely than not that exposure to a particular manufacturer's product was a substantial factor in producing his or her injuries, and proximate causation can not be shown if the plaintiff did not consume a

product that was actually produced by a sued manufacturer. Fields v. Wyeth, Inc., 613 F. Supp. 2d 1056 (W.D. Ark. 2009).

Two prescription drug manufacturers were granted summary judgment as to a consumer's products liability, negligence, fraudulent misrepresentation, negligent misrepresentation, fraudulent concealment, and breach of implied warranty claims because the factual allegations in the complaint established that the suit was a "product liability action" as defined in subdivision (5) of this section, such an action required the consumer to show that it was more likely than not that exposure to the manufacturers' products was a substantial factor in producing her injuries, and the consumer could not make that showing because the manufacturers produced only brand-name version of a drug and the consumer stipulated that she had ingested only generic versions of the drug. The manufacturers could not be held liable for failure to warn and failure to label merely because generic drug manufacturers and the consumer's doctor may have relied upon information that they provided with regard to their own name-brand drugs. Fields v. Wyeth, Inc., 613 F. Supp. 2d 1056 (W.D. Ark. 2009).

Product Liability Action.

Consumer's suit constituted a "product liability action" as defined in subdivision (5) of this section because although she asserted products liability, negligence, fraudulent misrepresentation, negligent misrepresentation, fraudulent concealment, and breach of implied warranty legal claims, the allegations in her complaint showed that she was seeking to recover for personal injuries that she allegedly sustained as the result of the failure of three prescription drug manufacturers to adequately warn about the side effects of a prescription drug that she ingested and failure to include adequate warnings on the labels used for the drug. Fields v. Wyeth, Inc., 613 F. Supp. 2d 1056 (W.D. Ark. 2009).

16-116-103. Limitation on actions.

CASE NOTES

Running of Statute.

Jury could have found that a consumer's cause of action accrued at some point after the publication of a study's results, under this section, because (1) defendants, corporation and a company, changed their products' labeling significantly following the publication of the study's findings, devoting substantial label space to the results of the study; (2) the consumer presented sufficient evidence for the jury to find that the warnings were inadequate, contradictory, and confusing; and (3) the jury could have reasonably concluded that if medical doctors were unsure of the risk that hormone replacement therapy caused breast cancer, it was highly unlikely that a layperson would have been more aware of that risk. Scroggin v. Wyeth (In re Prempro Prods. Liab. Litig.), 586 F.3d 547 (8th Cir. 2009).

CHAPTER 118

MISCELLANEOUS ACTIONS

16-118-103. Gambling debts and losses.

(a)(1)(A)(i) Any person who loses any money or property at any game or gambling device, or any bet or wager whatever, may recover the money or property by obtaining a judgment ordering the return of the

money or property following an action against the person winning the money or property.

(ii) The suit shall be instituted within ninety (90) days after the paying over of the money or property so lost.

(B) The replevin suit provided for in subdivision (a)(1)(A) of this section does not excuse a person from liability for or create a defense under § 5-2-601 et seq. to any crime of violence with which he or she may be charged as a result of conduct to recover money or property so lost.

(2) The heirs, executors, administrators, or creditors of the person losing any money or property at any game or gambling device, or on any bet or wager whatever, may have the same remedy as is provided in subdivision (a)(1) of this section for the person losing.

(3) Nothing in this subsection shall be so construed as to enable any person to recover any money or property lost on any turf race.

(b)(1) All judgments, conveyances, bonds, bills, notes, securities, and contracts, where the consideration or any part thereof is money or property won at any game or gambling device, or any bet or wager whatever, or for money or property lent to be bet at any gaming or gambling device, or at any sport or pastime whatever, shall be void.

(2) The assignment of any bond, bill, note, judgment, conveyance, contract, or other security shall not affect the defense of the person executing the assignment.

(c) Any matter of defense under this section may be specially pleaded or may be given in evidence under the general issue.

(d)(1) In all suits under this section, the plaintiff may call on the defendant to answer on oath any interrogatory touching the case, and if the defendant refuses to answer, the same shall be taken as confessed.

(2) The answer shall not be admitted as evidence against the person in any proceedings by indictment.

(e) It is the strong public policy of the State of Arkansas that gambling, whether regulated or unregulated, on credit is an unenforceable contract and the courts of this state shall not enforce gambling debts, regardless of whether the contract was entered into within this state or without this state.

History. Rev. Stat., ch. 68, §§ 1-8; C. & M. Dig., §§ 4899-4905; Pope's Dig., §§ 6112-6118; A.S.A. 1947, §§ 34-1601 — 34-1608; Acts 1999, No. 985, § 1; 2003, No. 1185, § 243; 2009, No. 460, § 2.

A.C.R.C. Notes. Acts 2009, No. 460, § 3, provided: "It is the intent of this Act to overrule Daniels v. State, 373 Ark. 536, ___ S.W.3d ___ (2008), and its interpretation of § 16-118-103(a)(1). That case and its interpretation of replevin and the holding in Davidson v. State, 200 Ark. 495, 139 S.W.2d 409 (1940), are contrary to the public policy of this State."

Amendments. The 2009 amendment, in (a)(1), inserted (A)(1)(B), redesignated the remaining text accordingly, and inserted "obtaining a judgment ordering the return of the money or property following an" in (a)(1)(A)(i).

CASE NOTES

Construction With Other Laws.

Because defendant who stabbed a victim multiple times with a long knife was attempting to recover money that he had lost gambling with the victim, to which he had a right under this section, defendant could not be found guilty of aggravated robbery absent evidence that he was trying to get money in addition to money lost by gambling. Daniels v. State, 373 Ark. 536, 285 S.W.3d 205 (2008), superseded by statute as stated in, Heard v. State, 2009 Ark. 546, — S.W.3d — (2009).

16-118-107. Civil action by crime victim.

(a)(1) Any person injured or damaged by reason of conduct of another person that would constitute a felony under Arkansas law may file a civil action to recover damages based on the conduct.

(2) The burden of proof for showing conduct that constituted a felony shall be a preponderance of the evidence.

(3) If the person who is injured or damaged prevails, he or she shall be entitled to recover costs and attorney's fees.

(b) The action may be maintained by the person who was injured or damaged or, after the person's death, the executor, administrator, or representative of his or her estate.

(c) The remedy provided in this section shall be in addition to any other remedies in law or equity.

(d) This section does not apply to offenses under § 5-28-101 et seq. or § 5-55-101 et seq.

History. Acts 1997, No. 341, § 1; 2011, No. 223, § 1.

Amendments. The 2011 amendment added (d).

Cross References. General provisions, § 5-28-101 et seq.

Medicaid fraud act, § 5-55-101 et seq.

CASE NOTES

Analysis

Dismissal.
Dismissal Denied.
Judgment on Pleadings.

Dismissal.

District court did not commit plain error or abuse its discretion in exercising its supplemental jurisdiction under 28 U.S.C.S. § 1367 and dismissing a 42 U.S.C.S. § 1983 plaintiff's pendent claim of this section with prejudice because that claim arose out of the same core of operative facts that gave rise to plaintiff's federal claims, which were dismissed, and plaintiff failed to defend the pendant state law claim and/or urge the district court to dismiss it without prejudice, which it had discretion to do. Baker v. Chisom, 501 F.3d 920 (8th Cir. 2007), cert. denied, 554 U.S. 902, 128 S. Ct. 2932, 171 L. Ed. 2d 864 (2008).

Conduct that constituted mail fraud under 18 U.S.C.S. §§ 1341, 1342 did not constitute a felony under Arkansas law as was required for a civil action under this section. Murphy v. LCA-Vision, Inc., — F. Supp. 2d —, 2011 U.S. Dist. LEXIS 22156 (E.D. Ark. Mar. 4, 2011).

Dismissal Denied.

Plaintiffs pleaded a facially plausible claim under this section where they alleged that the January patient notification letter defendants sent out could reasonably be construed as representing that plaintiffs were abandoning their patients or that defendants were terminating the physician-patient relationship between plaintiffs and the office's patients, the letter arguably constituted a written in-

strument that did or may have evidenced, created, transferred, terminated, or otherwise affected a legal right, interest, obligation, or status under § 5-37-201. Murphy v. LCA-Vision, Inc., — F. Supp. 2d —, 2011 U.S. Dist. LEXIS 22156 (E.D. Ark. Mar. 4, 2011).

Judgment on Pleadings.

Judgment on the pleadings was entered against several Arkansas counties as to their claims under § 5-64-1102 and this section, because the counties' allegations did not show that companies that produced and marketed cold remedies containing ephedrine and pseudoephedrine, which ingredients were used in manufacturing methamphetamine (meth), unlawfully sold, distributed, or dispensed the remedies with reckless disregard as to how they would be used: (1) the counties did not allege that the companies failed to comply with federal law or §§ 5-64-1101 or 5-64-1103, which regulated the possession and sale of products containing ephedrine or pseudoephedrine; (2) it appeared that § 5-64-1101, rather than § 5-64-1102, applied to the companies because there was nothing in the record showing that the companies distributed their remedies to unlicensed or unregistered entities or that their commercial buyers, which included retailers, intended to use the remedies to manufacture meth; and (3) even if § 5-64-1102 applied, the counties did not offer any example of the companies' alleged reckless behavior beyond their broad assertion that distributing the remedies in their current pharmaceutical formulation was reckless. Independence County v. Pfizer, Inc., 534 F. Supp. 2d 882 (E.D. Ark. 2008), aff'd, Ashley County v. Pfizer, 552 F.3d 659 (8th Cir. 2009).

16-118-108. Civil actions against sellers of drug paraphernalia.

(a) As used in this subchapter, "drug paraphernalia" means those items as defined by §§ 5-64-101, 5-64-403(a)(4), 5-64-443, and 5-64-505.

(b)(1) Any person who becomes addicted to any controlled substance, as a result of the use of any drug paraphernalia sold to him or her by a store dealing in drug paraphernalia items, has a cause against the seller if the person can prove that the item purchased from the seller's store contributed to his or her addiction.

(2) Any parent or guardian may bring a cause of action described in subsection (a) of this section on behalf of a minor.

(c) Any third person injured or killed by a person using a controlled substance, whose use was caused or aided by the use of drug paraphernalia sold to the person by a store dealing in drug paraphernalia items, has a cause of action against the seller if the third person can prove that the item purchased from the store contributed to the person's use and the person's use proximately caused the third person's injury or death.

(d) Any person who requires hospitalization or outpatient service for drug abuse or a related medical problem is entitled to recover from any store that has sold any drug paraphernalia to the person and reimbursement for any such costs incurred.

(e) Any federal or state agency that provides medical or kindred treatment to any person who is addicted to drugs as a result of the use of any drug paraphernalia may cause litigation to be commenced against any store or individual that has sold an item of drug paraphernalia that contributed to the person's drug abuse and subsequent treatment, for the purpose of collecting the reasonable costs incurred by the federal or state agency.

(f) Prior to awarding any damages under this subchapter, the trier of fact shall make written determinations regarding the following questions:

(1) That a reasonably prudent person acting as the seller would have known or should have known that the item sold would be utilized in the unlawful use of drugs;

(2) Considering all the facts and circumstances surrounding the sale, including the physical characteristics of the business establishment and its method of operation, that the seller knew or should have known that the items sold would be utilized in the unlawful use of drugs.

History. Acts 1981, No. 971, §§ 1-6; A.S.A. 1947, § 82-2645, § 82-2646, § 82-2647, 82-2648, 82-2649, 82-2650; Acts 2011, No. 570, § 118.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment substituted "5-64-403(a)(4), 5-64-443" for "5-64-403" in (a).

CHAPTER 120

IMMUNITY FROM TORT LIABILITY

Subchapter 1 — General Provisions

16-120-101. Legislative determination.

RESEARCH REFERENCES

Ark. L. Notes. Sampson, Nonprofit Risk; Nonprofit Insurance, 2008 Ark. L. Notes 83.

CHAPTER 122

CIVIL LIABILITY OF PERSONS CAUGHT SHOPLIFTING

SECTION.

16-122-102. Written demand required — Amount of damages.

Effective Dates. Acts 2009, No. 956, § 34: Apr. 6, 2009. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that laws concerning juveniles need to be amended and updated; that the fair and efficient administration of juvenile law is highly important to society at large; and that this act is immediately necessary because the judiciary needs to begin addressing these changes in laws involving juveniles. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Gov-

ernor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

16-122-102. Written demand required — Amount of damages.

(a) Under the provisions of this subchapter, the owner or seller shall issue a written demand letter by certified mail for the return of the merchandise or, only if the merchandise has not been returned or recovered, its retail cash equivalent, and a penalty in the amount of two hundred dollars ($200) for an adult to the last known address of the adult.

(b) If the individual to whom the written demand is sent complies with the terms of the demand letter within thirty (30) days of the receipt of the letter, that individual shall not be subject to further civil liability with respect to that specific act of retail theft.

(c)(1) If the individual to whom the written demand is sent does not comply within thirty (30) days of the receipt of a demand letter, then the owner or seller may bring an action against the individual for the recovery of civil damages and penalties in any court of competent jurisdiction if the total damages do not exceed the jurisdictional limit of that court.

(2) In an action brought under this subsection, the owner or seller may recover the following:

(A)(i) Civil damages in an amount equal to the retail value of the merchandise if the merchandise is not recovered or returned; or

(ii) If the merchandise is recovered or returned, civil damages in an amount equal to the difference between the market value of the recovered or returned merchandise and the retail value of the recovered or returned merchandise;

(B) A civil penalty of up to one thousand dollars ($1,000) for an adult;

(C) Court costs; and

(D) A reasonable attorney's fee.

(d) This section does not apply to juveniles subject to the Arkansas Juvenile Code of 1989, § 9-27-301 et seq.

History. Acts 1993, No. 936, § 4; 2003, No. 1185, § 250; 2009, No. 956, § 33.

Amendments. The 2009 amendment, in (a), deleted "or emancipated minor, or one hundred dollars ($100) for an unemancipated minor" following "for an adult," and deleted "emancipated minor, employee, or parent or legal guardian of the unemancipated minor in question" following "address of the adult"; in (c), deleted (c)(2)(B)(ii), redesignated the remaining text accordingly, and deleted "or emancipated minor" following "for an adult" in present (c)(2)(B); and made related changes.

CHAPTER 123
CIVIL RIGHTS

SUBCHAPTER.
3. Arkansas Fair Housing Commission.

Subchapter 1 — The Arkansas Civil Rights Act of 1993

16-123-101. Title.

CASE NOTES

Analysis

In General.
Deliberate Indifference.
Disability Discrimination.
Pretext.
Respondeat Superior.

In General.

Summary judgment was properly denied where employee's evidence created a genuine issue of fact as to whether supervisor's proffered reasons for firing all African-American employees was pretextual and raised a reasonable inference that employee's race was a determinative factor in his firing, in violation of the Arkansas Civil Rights Act of 1993, § 16-123-101 et seq. Cannon v. Hillis, — F. Supp.2d —, 2005 U.S. Dist. LEXIS 37108 (E.D. Ark. June 30, 2005).

In a certified question, the Arkansas Supreme Court adopted the federal deliberate indifference standard as the proper standard to apply to claims under the Arkansas Civil Rights Act (Act). Thus, a federal district court applied the correct standard to a pretrial detainee's state claims under the Act. Grayson v. Ross, 483 F.3d 887 (8th Cir. 2007).

Employer was denied summary judgment in a temporary employee's race discrimination action brought under the Arkansas Civil Rights Act of 1993, § 16-123-101 et seq., because the employee presented evidence sufficient to create a genuine issue of fact on the ultimate issue of whether race was a motivating factor in the employer's decision to hire the coworker rather than the employee for a permanent position as the employee presented evidence that the plant manager had considered him to be qualified, that the employer had a history of hiring very few African-Americans and that those few had been subjected to persistent racially derogatory remarks despite complaints to the supervisors, and that the supervisor who made the decision to hire the coworker rather than the employee had in the past made racially derogatory remarks to the effect that black people were lazy and worthless, and that the same supervisor continued to tolerate racially derogatory remarks by persons under his supervision. Harris v. Bilco Co., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 77718 (E.D. Ark. Oct. 3, 2008).

Court denied a former employer's motion for summary judgment on a former employee's retaliation claim under the Arkansas Civil Rights Act, § 16-123-101 et seq., as a question of fact existed as to whether the employee's transfer to another job was an adverse action because (1) a reasonable jury could find that the extra cost and time associated with commuting an extra 450 miles a week to the location of the employee's new job was materially adverse; (2) the employee presented evidence from which a jury could find that retaliation was a motivating factor in the adverse action; (3) a jury could find that the employee was transferred to a less desirable position in an effort to coerce her to resign; and (4) a reasonable jury could find that the employer's asserted reason for the transfer, that there were no openings at her old job, was pretextual. Hobby v. Underground Utils. Contrs., Inc., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 77875 (E.D. Ark. Oct. 3, 2008).

Motorist's complaint brought under the Arkansas Civil Rights Act, § 16-123-101 et seq., alleging that county officers were

without jurisdiction to set up a roadblock and that the motorist's subsequent stop, detention, and arrest violated Ark. Const., Art. 2, § 15, was properly dismissed because the motorist failed to state a claim where the complaint did not assert that the officers' actions were unreasonable. Wade v. Ferguson, 2009 Ark. 618, — S.W.3d — (2009).

Deliberate Indifference.

Judgment entered against a prison warden in a state prison inmate's 42 U.S.C.S. § 1983 and Arkansas Civil Rights Act of 1993, § 16-123-101 et seq., suit was reversed because the evidence did not support the district court's finding that the warden was deliberately indifferent to the inmate's safety, in violation of the inmate's rights under U.S. Const., Amend. VIII, and the Arkansas Constitution: (1) the warden had investigated the grievances that were filed against two corrections officers, arising from their alleged mistreatment of prisoners, he had found that they were typical of grievances that were generally filed against corrections officers, and he had taken disciplinary action against the offending officer with regard to the one grievance that he found was substantiated; (2) the officers' employment records did not give the warden cause to believe that they presented a substantial risk to the safety of prisoners; and (3) the district court's disagreement with the warden's disciplinary choices, specifically the warden's failure to require the offending officer to participate in a remedial program in addition to the one-week suspension, temporary job reassignment, and reprimand that he received, was not sufficient to support the deliberate indifference finding. Lenz v. Wade, 490 F.3d 991 (8th Cir. 2007), cert. denied, 552 U.S. 998, 128 S. Ct. 504, 169 L. Ed. 2d 353 (2007).

Disability Discrimination.

Employer was entitled to summary judgment with respect to an employee's failure to accommodate claim under the Americans with Disabilities Act of 1990, 42 U.S.C.S. § 12101 et seq. (ADA), and the Arkansas Civil Rights Act of 1993, § 16-123-101 et seq., because the employee could not make out a prima facie case that she was otherwise qualified, under 42 U.S.C.S. § 12111, to perform her job at the time of her discharge, given that she was completely unable to work for seven months prior to her termination, and she exhausted all of her company provided leave. There were absolutely no facts in the record to demonstrate that, on the date of the employee's termination, the employer had any reason to believe that the employee was able to return to work or would have been able to return in the near future. Ragsdale v. Wolverine Worldwide, Inc., — F. Supp. 2d —, 1998 U.S. Dist. LEXIS 23588 (E.D. Ark. Nov. 3, 1998), aff'd, 218 F.3d 933 (8th Cir. 2000).

Pretext.

Employee's racial discrimination claim against a school district under 42 U.S.C.S. §§ 1981, 1983, and 2000e and this section failed because there was insufficient evidence of pretext. There was no showing that the employee's qualifications for a new position were comparable to those of the successful applicant, and evidence that the school district did not follow its own hiring procedures was insufficient to establish pretext for discrimination. Dixon v. Pulaski County Special Sch. Dist., 578 F.3d 862 (8th Cir. 2009).

Respondeat Superior.

Just like 42 U.S.C.S. § 1983, the doctrine of respondeat superior is not a basis for liability under the Arkansas Civil Rights Act of 1993, §§ 16-123-101 through 16-123-108; therefore, summary judgment was properly granted to the Arkansas Crime Information Center, its director, and a state governor, in an action alleging misuse of expunged records where someone allegedly accessed them inappropriately and posted them on the Internet. Jones v. Huckabee, 369 Ark. 42, 250 S.W.3d 241 (2007).

Cited: City of Farmington v. Smith, 366 Ark. 473, 237 S.W.3d 1 (2006).

16-123-102. Definitions.

CASE NOTES

Analysis

Applicability.
Disability.

Applicability.

Employee's claims against employers under 42 U.S.C.S. § 1981 and the Arkansas Civil Rights Act of 1992 were not barred by the doctrines of judicial estoppel or by lack of standing because the employee was not required to disclose the potential claims on her Chapter 7 bankruptcy schedules when the Chapter 7 proceedings were closed more than four years before the discrimination lawsuit was filed and the employee did not work for the employer at the time the bankruptcy petition was pending. Goodwin v. Conagra Poultry Co., — F. Supp.2d —, 2006 U.S. Dist. LEXIS 21982 (W.D. Ark. Mar. 27, 2006).

Pursuant to the Arkansas Civil Rights Act of 1993, §§ 16-123-101 — 16-123-108, the trial court did not err in granting the employer's motion for summary judgment on the employer's gender discrimination claim as the employee was not eligible for leave under FMLA or pre-FMLA as she had only been with the company a short time; the employee did not proffer evidence to prove that the explanation provided by the employer was pretextual. Greenlee v. J.B. Hunt Transp. Servs., 2009 Ark. 506, — S.W.3d — (2009).

Disability.

Court granted a former employer's motion for summary judgment on a former employee's sex discrimination claim under the Arkansas Civil Rights Act, § 16-123-101 et seq., because the policy of offering light duty for only work-related injuries did not discriminate against pregnant employees, and the employee failed to establish that the employer treated her differently than similarly situated nonpregnant employees. Hobby v. Underground Utils. Contrs., Inc., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 77875 (E.D. Ark. Oct. 3, 2008).

Cited: Goodwin v. Conagra Poultry Co., — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 21965 (W.D. Ark. Mar. 27, 2006).

16-123-104. Construction.

CASE NOTES

Dismissal Improperly Denied.

In a civil rights action against a state trooper, a trial court erred by denying the trooper's motion to dismiss because he was immune from liability under Ark. Const. art. 5, § 20 in his official capacity since there was no waiver of sovereign immunity under §16-123-104; the action was tantamount to one against the State itself. Simons v. Marshall, 369 Ark. 447, 255 S.W.3d 838 (2007).

16-123-105. Civil rights offenses.

RESEARCH REFERENCES

ALR. What constitutes racial harassment in employment violative of state civil rights acts. 17 A.L.R.6th 563.

CASE NOTES

Analysis

Claim Dismissed.
Claim Not Dismissed.
Deliberate Indifference Standard.
Retaliation.
Supplemental Jurisdiction.

Claim Dismissed.

Employee's claim against the Department of Correction and two state employees, alleging violations of 42 U.S.C.S. § 1983, Title VII of the Civil Rights Act of 1964, the Arkansas Civil Rights Act, § 16-123-101 et seq., and the Uniform Services Employment and Reemployment Rights Act, 38 U.S.C.S. § 4301 et seq., was dismissed as employee failed to show that she was subjected to an adverse employment action or was the victim of illegal relation after service she performed in the U.S. military ended and she returned to her job; the employee's pay and grade were not changed, and although she had a tense relationship with a male employee who was hired to fill her position while she was serving in the military, there was no evidence of discriminatory animus or actionable harm. Clegg v. Ark. Dep't of Corr., — F. Supp.2d —, 2006 U.S. Dist. LEXIS 44973 (E.D. Ark. June 20, 2006), aff'd, 496 F.3d 922 (8th Cir. 2007).

Public employee did not state a claim under either the First Amendment or the Arkansas Civil Rights Act (ACRA) where his letter to the director regarding his reassignment was written as an employee addressing an issue of personal concern, not as a citizen speaking on a matter of public concern. Hicks v. Ark. Dep't. of Health & Human Servs., — F. Supp.2d —, 2006 U.S. Dist. LEXIS 64443 (E.D. Ark. Sept. 8, 2006).

Federal district court rejected parents' argument that subsection (a) of this section created a cause of action against a school district and a vice principal because the district and the vice principal failed to enforce § 6-18-514, which guaranteed their son the right to receive a public education in an environment that was reasonably free from substantial intimidation, harassment, or harm or threat of harm by other students. Subsection (a) of this section created a private right of action when a person claimed that rights, privileges, or immunities that were secured by the Arkansas Constitution were violated, but did not create a private right of action for violation of state statutes. Wolfe v. Fayetteville Ark. Sch. Dist., 600 F. Supp. 2d 1011 (W.D. Ark. 2009).

In a former inmate's action for damages stemming from a rape by a county jailer, a county judge was entitled to summary judgment dismissing the civil rights claims under this section on immunity grounds under § 21-9-301 because the inmate failed to establish that the County acted with deliberate indifference when it hired the jailer where the inmate only offered unsupported allegations that the jailer had previously inappropriately hugged and kissed a 16-year-old female inmate; an unwanted hug and kiss were not nearly identical enough to the inmate's allegations to constitute deliberate indifference. Gentry v. Robinson, 2009 Ark. 634, — S.W.3d — (2009).

Police officer was entitled as a matter of law to qualified immunity on claims under subsection (a) of this section asserted by appellee father because the undisputed facts demonstrated probable cause for the father's arrest for driving on the wrong side of the road in contravention of § 27-51-301(a). Martin v. Hallum, 2010 Ark. App. 193, — S.W.3d — (2010).

Claim Not Dismissed.

Where a towing company sold an arrestee's truck, the arrestee's due process claim survived summary judgment because (1) regarding the federal due process claim, the towing company was acting under color of state law, (2) the towing company owner's action of selling the truck was an action by someone representing official company policy, and (3) the Arkansas Civil Rights Act claim was essentially the same as the federal due process claim. Smith v. Insley's, Inc., 499 F.3d 875 (8th Cir. 2007).

Police officer engaged in racial profiling prohibited by state statute, the state constitution, the U.S. Constitution, and the city's written policy and the officer also illegally seized one of the plaintiffs, thereby violating U.S. Const., Amend. IV and the state constitution; the police chief, who supervised the officer and ran the police department, was deliberately indifferent to ongoing and systemic racial pro-

filing of which he was aware and municipal liability was imposed on the city as it permitted the officer to establish and to carry out a custom and practice of engaging in racial profiling. The officer's true objective was not to enforce traffic laws prohibiting people from driving with their vision obstructed or other minor infractions; rather, the neutral traffic laws were used as a pretext for harassing Hispanics (whether here legally or illegally), for obtaining money through fines and towing charges for the financially troubled city, and to provide an incentive for Hispanics to move out of the area—clearly illegitimate objectives. Giron v. City of Alexander, 693 F. Supp. 2d 904 (E.D. Ark. 2010).

Deliberate Indifference Standard.

Arkansas Supreme Court adopts deliberate indifference as the proper standard for the health needs of pretrial detainees under the Arkansas Civil Rights Act. Grayson v. Ross, 369 Ark. 241, 253 S.W.3d 428 (2007).

Retaliation.

Former university employee's free speech retaliation claim under this section and Ark. Const., Art. II, § 6 failed because the employee's filing of sexual harassment complaints against co-workers did not constitute protected speech; the employee was merely responding to sexual harassment allegations made against the employee by the co-workers, and the employee filed the complaints in an effort to avoid termination rather than as a matter of public concern. McCullough v. Univ. of Ark. for Med. Scis., 559 F.3d 855 (8th Cir. 2009).

Where a white employee resigned, the employee's retaliation claim failed because (1) the employee said nothing in a phone call about race discrimination, and (2) the employee did not demonstrate a materially adverse action since the employee failed to offer sufficient evidence of a constructive discharge; the employee's racially hostile work environment claim also failed. Helton v. Southland Racing Corp., 600 F.3d 954 (8th Cir. 2010).

Supplemental Jurisdiction.

Pretrial detainee's claims under this section, the Arkansas Civil Rights Act, and 42 U.S.C.S. § 1983, which were based on allegations that county officials failed to seek medical treatment for the detainee for severe drug intoxication, derived from a common nucleus of operative fact. The exercise of supplemental jurisdiction pursuant to 28 U.S.C.S. § 1367(a) over the state law claim was therefore appropriate. McRaven v. Sanders, 577 F.3d 974 (8th Cir. 2009).

Cited: Jones v. Huckabee, 369 Ark. 42, 250 S.W.3d 241 (2007).

16-123-107. Discrimination offenses.

CASE NOTES

Analysis

Claim Dismissed.

Employee who claimed to have been discriminated against on the basis of race and gender following the employee's return from military duty failed to sufficiently allege an adverse employment action as required to establish a claim under the Arkansas Civil Rights Act, § 16-123-101 et seq.; the record did not support an allegation that the employee was not put back into the position that the employee held prior to military duty, and other alleged actions, including a delay in providing certain items and a temporary reassignment for training, did not affect material aspects of employment. Clegg v. Ark. Dep't of Corr., 496 F.3d 922 (8th Cir. 2007).

Claim Not Dismissed.

Employer was denied summary judgment with regard to an employee's race discrimination/failure to promote claims under the Arkansas Civil Rights Act of 1993, Title VII of the Civil Rights Act of

1964, and 42 U.S.C.S. § 1981: (1) the employer contended that the judicial estoppel doctrine applied to bar the employee from asserting her employment discrimination claims as a matter of law because her claims arose after she filed a Chapter 13 bankruptcy petition and she had failed to disclose the claims in any of her bankruptcy filings, even after she converted her case to a Chapter 7 case; (2) the employee had taken inconsistent legal positions, for judicial estoppel purposes, by filing her employment discrimination suit after failing to disclose her claims in the bankruptcy court; and (3) the judicial estoppel doctrine did not apply, however, because no manifest injustice had occurred, as the employee had since reopened her Chapter 7 case, the bankruptcy court had ruled that the suit was exempt from the employee's bankruptcy, and the employee's creditors could file claims against any recovery that she obtained in excess of the statutory exemption amount. Francis v. Ark. Blue Cross & Blue Shield, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 48049 (E.D. Ark. July 2, 2007).

Disability Discrimination.

Where employee with depression sought meeting agendas as reasonable accommodation, employer was not entitled to judgment as a matter of law on the failure-to-accommodate claims because there was record support for the jury's findings that (1) employee was disabled due to depression and anxiety that substantially limited employee's ability to think and concentrate, (2) employer failed to engage in a good-faith interactive process with employee, and (3) employee's request was reasonable. Battle v. UPS, 438 F.3d 856 (8th Cir. 2006).

Evidence.

Employer was entitled to summary judgment on an employee's failure to promote claim under Title VII of the Civil Rights Act, 42 U.S.C.S. § 2000e et seq., 42 U.S.C.S. §§ 1981, 1983, and the Arkansas Civil Rights Act, § 16-123-107 et seq., because the undisputed facts showed that the person who was promoted to the position at issue was substantially more qualified than the employee both in education and experience and there was no evidence of discrimination based on race or sex. Tabb v. Allen, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 10156 (E.D. Ark. Feb. 4, 2009).

Employer was entitled to summary judgment on an employee's sex and race discrimination claims under Title VII of the Civil Rights Act, 42 U.S.C.S. § 2000e et seq., 42 U.S.C.S. §§ 1981, 1983, and the Arkansas Civil Rights Act, § 16-123-107 et seq., involving the employer's failure to assign her a vehicle and fully reimburse her for certain mileage, because there was no evidence that discrimination based on race or sex influenced these decisions. Tabb v. Allen, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 10156 (E.D. Ark. Feb. 4, 2009).

Pursuant to the Arkansas Civil Rights Act of 1993, §§ 16-123-101 — 16-123-108, the trial court did not err in granting the employer's motion for summary judgment on the employer's gender discrimination claim as the employee was not eligible for leave under FMLA or pre-FMLA as she had only been with the company a short time; the employee did not proffer evidence to prove that the explanation provided by the employer was pretextual. Greenlee v. J.B. Hunt Transp. Servs., 2009 Ark. 506, — S.W.3d — (2009).

Gender Discrimination.

Where employee was denied pregnancy leave and was terminated based on absences due to pregnancy, it could be inferred that the termination resulted from pregnancy discrimination since non-pregnant co-workers who were terminated for absences were reinstated within days of their terminations based on compelling circumstances, but the employer did not consider pregnancy to be a compelling circumstance. Densmore v. Pilgrim's Pride Corp., — F. Supp.2d —, 2006 U.S. Dist. LEXIS 82285 (E.D. Ark. Nov. 9, 2006).

Former employee's sex discrimination claim under this section of the Arkansas Civil Rights Act failed, given evidence that the employee was terminated for sexually harassing co-workers and then filing untruthful sexual harassment complaints against those co-workers. Nothing in the record indicated that the officials who decided to terminate the employee lacked a good-faith belief that the employee committed sexual harassment and was untruthful, and the evidence did not raise a reasonable inference that sex dis-

crimination motivated the employee's termination. McCullough v. Univ. of Ark. for Med. Scis., 559 F.3d 855 (8th Cir. 2009).

Racial Harassment.

In almost 20 years of working with employer, plaintiff herself overheard a coworker use the "n" word one time and saw a dummy in a hangman's noose once; this was not severe or pervasive enough to create an objectively hostile or abusive work environment, one that a reasonable person would have found hostile or abusive. Martin v. Bemis Co., — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 9761 (W.D. Ark. Feb. 10, 2006).

Where a white employee resigned based on condescending emails, denial of day shifts, and a supervisor's alleged attempt to implicate the employee in the theft of cash, the racially hostile work environment claim failed because the alleged verbal harassment was neither frequent nor severe, and the employee failed to offer sufficient evidence that the employee was constructively discharged. Helton v. Southland Racing Corp., 600 F.3d 954 (8th Cir. 2010).

Sexual Harassment.

Former employee failed to establish sexual harassment in violation of this section, the Arkansas Civil Rights Act, because her supervisor's comments that he controlled her job and she should be nice to him and his acts of rubbing her shoulders were not sufficiently severe or pervasive to create a sexually hostile work environment. Anderson v. Family Dollar Stores of Ark., Inc., 579 F.3d 858 (8th Cir. 2009).

Former employee failed to establish quid pro quo sexual harassment in violation of this section, the Arkansas Civil Rights Act, because she did not show that she suffered an adverse tangible employment action as a result of her refusal to submit to an implied or inferred demand for sexual favors from her supervisor. Anderson v. Family Dollar Stores of Ark., Inc., 579 F.3d 858 (8th Cir. 2009).

Statute of Limitations.

Former employee filed her Equal Employment Opportunity Commission (EEOC) charge on December 5, 2006, far more than 180 days after her supervisor's last offensive email to her and the employee did not allege sexual harassment acts within the statutory period; her federal claim for sexual harassment was therefore time barred. The employee filed her suit on December 26, 2007, more than one year after the last date of alleged sexual harassment; because her EEOC charge alleging sexual harassment was untimely filed, the employee could not rely on it to support the timeliness of her Arkansas Civil Rights Act, § 16-123-101 et seq., harassment claim. Burkhart v. Am. Railcar Indus., Inc., 603 F.3d 472 (8th Cir. 2010).

Cited: Goodwin v. Conagra Poultry Co., — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 21965 (W.D. Ark. Mar. 27, 2006).

16-123-108. Retaliation — Interference — Remedies.

RESEARCH REFERENCES

ALR. What constitutes activity of employee protected under state whistleblower protection statute covering employee's "report," "disclosure," "notification," or the like of wrongdoing—Sufficiency of report. 10 A.L.R.6th 531.

What constitutes activity of employee, other than "reporting" wrongdoing, protected under state whistleblower protection statute. 13 A.L.R.6th 499.

CASE NOTES

Analysis

Adverse Employment Action.
Pretext.
Protected Activities.

Adverse Employment Action.

Employee who claimed to have been retaliated against following the employee's return from military duty failed to sufficiently allege an adverse employment

action as required to establish a claim under the Arkansas Civil Rights Act, § 16-123-101 et seq.; the record did not support an allegation that the employee was not put back into the position that the employee held prior to military duty, and other alleged actions, including a delay in providing certain items and a temporary reassignment for training, did not affect material aspects of employment. Clegg v. Ark. Dep't of Corr., 496 F.3d 922 (8th Cir. 2007).

Where a white employee resigned, the employee's retaliation claim failed because (1) a phone conversation was not protected conduct since the employee said nothing in the call about race discrimination, and (2) the employee did not demonstrate a materially adverse action since the employee failed to offer sufficient evidence of a constructive discharge. Helton v. Southland Racing Corp., 600 F.3d 954 (8th Cir. 2010).

Pretext.

That the employer forgave the employee's earlier errors did not prohibit it from terminating her when the mistakes continued and worsened; even if the employee could establish a prima facie retaliation case, no reasonable factfinder could conclude that the employer's proffered reason for firing her was pretextual as required in the McDonnell Douglas framework. Burkhart v. Am. Railcar Indus., Inc., 603 F.3d 472 (8th Cir. 2010).

Protected Activities.

Former employee's retaliation claim under this section of the Arkansas Civil Rights Act failed, given evidence that the employee was terminated for sexually harassing co-workers and for filing untruthful complaints accusing the co-workers of sexual harassment. The evidence showed that the employee was discharged not for filing complaints, but for filing untruthful complaints. McCullough v. Univ. of Ark. for Med. Scis., 559 F.3d 855 (8th Cir. 2009).

Subchapter 2 — Fair Housing

16-123-207. Representations prohibited.

CASE NOTES

Disability Employment Discrimination.

In an action in which a former employee filed suit against defendant former employer alleging violations of Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990 (ADA), and the Arkansas Civil Rights Act of 1993, the employee's claims pursuant to the ADA and the Arkansas Civil Rights Act under this section, must be dismissed; the undisputed evidence showed that the employer accommodated the employee's injuries by either allowing her to perform sedentary job duties or by otherwise providing her with work it believed to be within her restrictions. Williams v. Affiliated Foods Southwest, Inc., — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 29899 (E.D. Ark. Apr. 23, 2007).

Subchapter 3 — Arkansas Fair Housing Commission

SECTION.

16-123-303. Creation — Members.

(a) There is created the Arkansas Fair Housing Commission.

(b)(1) The commission shall consist of thirteen (13) voting members, to be selected as follows: Seven (7) appointed by the Governor, three (3)

appointed by the Speaker of the House of Representatives and three (3) appointed by the President Pro Tempore of the Senate, as set forth in this subchapter, for terms of four (4) years whose terms begin on January 1 and end on December 31 of the fourth year or when their respective successors are appointed and qualified.

(2)(A)(i) One (1) member shall have been a licensed real estate broker or licensed real estate salesperson engaged in the practice of residential real estate sales for not fewer than five (5) years prior to his or her nomination.

(ii) One (1) member shall have been a licensed real estate broker or licensed real estate salesperson engaged in the practice of multifamily real estate property management for no fewer than five (5) years prior to his or her nomination.

(iii) One (1) member shall have been a licensed real estate broker or licensed real estate salesperson engaged in the practice of real estate for no fewer than five (5) years prior to his or her nomination.

(B) The Governor shall appoint members to fill vacancies for the two (2) members to represent subdivisions (b)(2)(A)(i) and (ii) of this section from a list of four (4) nominees submitted by the Arkansas Realtors Association and a member to fill a vacancy for the one (1) member to represent subdivision (b)(2)(A)(iii) of this section not involving nominees from the Arkansas Realtors Association.

(3)(A) One (1) member shall have been a licensed homebuilder engaged in the homebuilding business for not fewer than five (5) years.

(B) The Governor shall appoint a member to fill a vacancy for the member to represent subdivision (b)(3)(A) of this section from a list of four (4) nominees submitted by the Arkansas Homebuilders Association.

(4)(A) One (1) member shall have been a mortgage broker employed for not fewer than five (5) years by a registered mortgage loan company or loan broker.

(B) The Governor shall appoint a member to fill a vacancy for the member to represent subdivision (b)(4)(A) of this section from a list of four (4) nominees submitted by the Arkansas Mortgage Bankers Association.

(5)(A) One (1) member shall have been a banker engaged in the banking business for not fewer than five (5) years.

(B) The Governor shall appoint a member to fill a vacancy for the member to represent subdivision (b)(5)(A) of this section from a list of four (4) nominees jointly submitted by the Arkansas Community Bankers and the Arkansas Bankers Association.

(6)(A)(i) Seven (7) members shall represent consumers and shall not be actively engaged in or retired from the business of real estate, homebuilding, mortgage lending or banking, including one (1) member who shall be appointed by the Governor to represent persons meeting the definition of "disabled" in this subchapter from a list of four (4) nominees submitted by the Governor's Commission on People with Disabilities.

(ii) Three (3) of the members to be appointed pursuant to subdivision (b)(6)(A)(i) of this section shall be appointed by the Speaker of the House of Representatives, one (1) member who shall be a fair housing attorney or advocate with at least five (5) years of experience in advocacy for fair housing issues.

(iii) Three (3) of the members to be appointed pursuant to subdivision (b)(6)(A)(i) of this section shall be appointed by the President Pro Tempore of the Senate, one (1) member of whom shall be sixty (60) years of age or older who shall represent the elderly.

(B) A minimum of four (4) appointments made pursuant to subdivision (b)(6)(A)(i) of this section shall be given to persons protected under §§ 16-123-310 — 16-123-316.

(c) All members shall be full voting members of the commission.

(d)(1) Members of the commission appointed by the Governor shall at all times include one (1) member from each Arkansas congressional district.

(2) Members appointed by the President Pro Tempore of the Senate shall be chosen from Arkansas congressional districts rotating in order, with the initial commissioners being chosen from districts one (1) and two (2).

(3) Members appointed by the Speaker of the House of Representatives shall be chosen from congressional districts rotating in order with the initial members being chosen from districts three (3) and four (4).

(e) The commission shall elect a chair from its membership.

(f) The commission shall meet at least quarterly.

(g)(1) The members of the commission shall serve four-year terms, except that the initial appointees shall serve staggered terms determined by a procedure established by the commission so that six (6) serve a two-year term and seven (7) serve a four-year term.

(2) No member may serve more than two (2) four-year terms.

(h) Each commissioner may receive expense reimbursement and stipends in accordance with § 25-16-905.

History. Acts 2001, No. 1785, § 4; 2007, No. 178, § 1.

Amendments. The 2007 amendment substituted "quarterly" for "one (1) time each month" in (f).

CHAPTER 125

IMMUNITY FOR YEAR 2000 COMPUTER ERRORS

SECTION.

16-125-101 — 16-125-104. [Repealed.]

Publisher's Notes. This chapter, concerning immunity for year 2000 computer errors, was repealed by Acts 2009, No. 157, § 1. The chapter was derived from the following sources:

16-125-101. Acts 1999, No. 1482, § 2.

16-125-102. Acts 1999, No. 1482, § 1.
16-125-103. Acts 1999, No. 1482, § 3.
16-125-104. Acts 1999, No. 1482, § 4.

CHAPTER 126

SALE OF ALCOHOL TO MINOR

Publisher's Notes. This Effective Dates note is being set out to reflect a revision to the approval date language.

Effective Dates. Acts 1999, No. 1596, § 10: July 30, 1999. While it was approved without Governor's signature, the emergency clause failed. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that recent court decisions indicate that the General Assembly must clarify the public policy of the State of Arkansas regarding liability for furnishing alcohol to a minor; that this act so provides; and that this act should go into effect as soon as possible in order that subsequent litigation be subject to this act. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

16-126-104. Civil liability for sale of alcohol to clearly intoxicated person.

CASE NOTES

Analysis

Alcohol Provider Not Liable.
Pleadings.

Alcohol Provider Not Liable.

Country club was not liable under this section to accident victims injured by a driver who had consumed alcohol at the country club's charitable fundraiser because there was no "sale" of alcohol to the driver by the country club; rather, the country club donated two bottles of wine for every table of 10 persons at the fundraiser. Under § 4-2-106(1), a sale consisted in the passing of title from the seller to the buyer for a price. Garcia v. Chenal Country Club, 2010 Ark. App. 180, — S.W.3d — (2010), review denied, Mason v. Chenal Country Club, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 396 (Aug. 6, 2010).

Pleadings.

Car accident victims failed to state a claim against a fraternity and its members who served kegs of beer at a party, leading one member to become intoxicated and crash into one of the victims, because liability was barred by § 16-126-106, and the fraternity was not a retailer of beverages under this section, although it charged admission to the party. Archer v. Sigma Tau Gamma Alpha Epsilon, Inc., 2010 Ark. 8, — S.W.3d — (2010).

16-126-106. Immunity from civil liability.

CASE NOTES

Liability.

Car accident victims failed to state a claim against a fraternity and its members who served kegs of beer at a party, leading one member to become intoxicated and crash into one of the victims, because liability was barred by this section, and the fraternity was not a retailer of beverages under § 16-126-104, although it charged admission to the party. Archer v. Sigma Tau Gamma Alpha Epsilon, Inc., 2010 Ark. 8, — S.W.3d — (2010).

TITLE 16 — APPENDIX
ARKANSAS COURT RULES

The following court rules were approved by the Supreme Court after the publication of the two volume edition of the Arkansas Code of 1987 Annotated in April 2011. The rules have varying effective dates. The rules are being published at the request of the Arkansas Code Revision Commission.

RULES OF CIVIL PROCEDURE

ARTICLE II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADING, MOTIONS, AND ORDERS

Rule 3. Commencement of action — "Clerk" defined.

(a) A civil action is commenced by filing a complaint with the clerk of the court who shall note thereon the date and precise time of filing.

(b) The term "clerk of the court" as used in these Rules means the circuit clerk and, with respect to probate matters, any county clerk who serves as ex officio clerk of the probate division of the circuit court pursuant to Ark. Code Ann. § 14-14-502(b)(2)(B). In counties where the county clerk serves as the ex officio clerk of any division of the circuit court, the filing requirement shall be satisfied when the complaint is filed with either the circuit clerk or the county clerk.

(c) The clerk shall assign a new case number and charge a new filing fee for the filing of any case that is refiled after having been dismissed. (Effective July 1, 2011)

Addition to Reporter's Notes, 2011 Amendment: The amendment adds a new subdivision (c) to clarify that a new case number is to be assigned and a new filing fee charged for a case re-filed after having been dismissed. The new case number and filing fee requirements apply to cases voluntarily or involuntarily dismissed under Rule 41. The new case number and filing fee requirements do not apply to cases that have not been dismissed but have been closed subject to reopening depending on further developments in the case. Consequently, the requirements do not apply to requests for modification of visitation, custody, or child support provisions in domestic relation cases; the filing of motions for contempt citations; and other requests for court orders in cases that have been closed, but not dismissed. However, other fees or charges authorized by law, such as case reopening fees, may be imposed.

Rule 4. Summons.

. . . .

Form for Notice and Acknowledgment for Service by Mail under Ark. R. Civ. P. 4(d)(8)(B)

This form is to be used only for service by mail under Rule 4(d)(8)(B) of the Arkansas Rules of Civil Procedure. It cannot be used for service by mail under Rule 4(d)(8)(A) or for service by a commercial delivery company under Rule 4(d)(8)(C).

NOTICE

To: [*Defendant's name and address*]

A lawsuit captioned _____ [insert caption of case from complaint] has been filed against you in the Circuit Court of _____ County, Arkansas. The enclosed summons and complaint are served on you in accordance with Rule 4(d)(8)(B) of the Arkansas Rules of Civil Procedure.

You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within 20 days. If you do not do so, you (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a summons and complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within the time specified in the summons.

If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint.

You must sign and date the acknowledgment. If you are served on behalf of a corporation, partnership, limited liability company, unincorporated association, or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and are authorized to receive service, you must indicate under your signature your authority.

As the sender of this Notice and Acknowledgment of Receipt of Summons and Complaint, I declare under penalty of perjury that it is being mailed on [date].

Sender's Address:

_____ _____

[Signature]

_____ _____

[Printed Name]

[Date of Signature]

ACKNOWLEDGMENT OF RECEIPT OF SUMMONS AND COMPLAINT

I declare, under penalty of perjury, that I received a copy of the summons and of the complaint in the lawsuit referenced above at [address] on [date].

[Signature]

[Printed Name]

[Relationship to Entity / Authority to Receive Service]

[Date of Signature]

(Effective July 1, 2011)

(Proposed) Rule 5. Service and filing of pleadings and other papers.

. . . .

(c) *Filing.*

. . . .

~~(2) Confidential information as defined and described in Sections III(A)(11) and VII(A) of Administrative Order 19 shall not be included as part of a case record unless the confidential information is necessary and relevant to the case. Section III(A)(2) of the Administrative Order defines a case record as any document, information, data, or other item created, collected, received, or maintained by a court, court agency or clerk of court in connection with a judicial proceeding. If including confidential information in a case record is necessary and relevant to the case:~~

~~(A) The confidential information shall be redacted from the case record to which public access is granted pursuant to Section IV(A) of Administrative Order 19. The point in the case record at which the redaction is made shall be indicated by striking through the redacted material with an opaque black mark or by inserting some explanatory notation in brackets, such as: [Information Redacted], [I.R.], [Confidential], or [Subject To Protective Order]. If an entire document is redacted, then the name of the document (with the number of pages redacted specified) should be noted in the publicly available court file and the~~

~~entire document should be filed under seal. The requirement that the redaction be indicated in case records shall not apply to court records rendered confidential by expungement or other legal authority that expressly prohibits disclosure of the existence of a record; and~~

~~(B) An un-redacted copy of the case record with the confidential information included shall be filed with the court under seal. The un-redacted copy of the case record shall be retained by the court as part of the court record of the case. It is the responsibility of the attorney for a party represented by counsel and the responsibility of a party unrepresented by counsel to ensure that confidential information is omitted or redacted from all case records that they submit to a court. It is the responsibility of the court, court agency, or clerk of court to ensure that confidential information is omitted or redacted from all case records, including orders, judgments, and decrees, that they create.~~

(Proposed) Rule 5.1. Redacting and Sealing Court Records.

(a) *Purpose.* This rule governs procedural issues related to the redacting and sealing of filings made in court records arising under (1) Administrative Order Number 19, (2) rules or statutes restricting public access to court records, and (3) a court's inherent power to seal court records.

(b) *Redacted Filings.* Unless the court orders otherwise, in an electronic or paper filing with the court that contains a person's social-security number, taxpayer-identification number or birth date, the name of a person known to be a minor, a financial-account number, or the addresses of a person requesting anonymity when seeking an order of protection pursuant to Ark. Code Ann. § 9-15-203, a party or nonparty making the filing shall:

(1) include only the last four digits of the social-security number or taxpayer-identification number;

(2) include only the year of the individual's birth;

(3) include only the minor's initials;

(4) include only the last four digits of the financial-account number; and

(5) redact any address of the person requesting anonymity when seeking an order of protection.

When redacting information, the point in the filing at which the redaction is made shall be indicated by striking through the redacted material with an opaque black mark or by inserting some explanatory notation in brackets, such as: [Information Redacted], [I.R.], [Confidential], or [Subject To Protective Order]. The requirement that the redaction be indicated in case records shall not apply to court records made confidential by expungement or other legal authority that expressly prohibits disclosure of a record's existence. If ordered by the

court, a person making a redacted filing may be required to file an unredacted copy under seal, and the court must retain the unredacted copy as part of the record.

(c) *Other Confidential Information.* Information in adoption records governed by Ark. Code Ann. § 9-9-217 and juvenile records governed by Ark. Code Ann. § 9-27-309 contained in a filing with the court may be redacted, as described above, either at the filer's initiative or by court order, or be filed under seal by court order pursuant to subsection (d) of this rule.

(d) *Filings Made Under Seal.* A filing may be sealed only by court order when required by law or for other good cause. A court should not seal those parts of a filing that may be reasonably redacted.

(1) *Motion to seal court record.* A party, or a person affected by the information sought to be sealed, may move the court to seal a document or other item in a case by filing a written motion. The request to seal must specify the document or item to be sealed, the legal basis on which the request is made, an explanation why redaction is not reasonable, and how long the material should be sealed. The parties' agreement alone will not be a sufficient reason for the court to seal a document or other item.

(2) *Access to court record while motion pending.* After a motion to seal has been filed, the information sought to be sealed shall remain confidential until the court rules on the motion.

(3) Hearing and order. The court may conduct a hearing on a motion to seal if requested by a party, an affected person, or on its own initiative. The court may order a document or other item in a case sealed if the court makes and enters written findings that the sealing is justified by identified compelling privacy or safety interests that outweigh the public access to the court record. Sealing may be permitted or required by:

(A) Administrative Order Number 19;

(B) federal or state law or rule of court; or

(C) an identified compelling circumstance.

In an order sealing a document or other item in a case, the court shall use the least restrictive means and duration. The material sealed by the court shall be sealed only as the court order directs. A sealed court record may be unsealed upon a showing of good cause.

(4) *Procedures for maintaining sealed court records.* When a document or other item in a case is filed under seal, the clerk shall restrict access to the sealed material. If the sealed record exists in a storage medium form other than paper, the clerk shall restrict access to the alternate storage medium to prevent unauthorized viewing of the sealed material. An entire case file should not be sealed. Unless otherwise prohibited, the following information shall be available for public viewing on court indices:

(A) the case number(s) or docket number(s);
(B) the date that the case was filed;
(C) the name of the document;
(D) the names of the parties and counsel of record;
(E) the notation "case sealed"; and
(F) the order to seal.

(e) *Protective Orders.* For good cause, the court may by order in a case:

(1) require redaction or sealing of information;

(2) permit access to information to which public access has been prohibited (see Administrative Order Number 19, Section (VIII)); or

(3) limit or prohibit a nonparty's remote electronic access to information filed with the court.

(f) *Waiver.* A party or other person waives the protection of this rule as to his or her own information by filing it without redaction and not under seal unless relief is subsequently granted by the court.

ARTICLE III. PLEADINGS AND MOTIONS

Rule 12. Defenses and Objections - When and How Presented - by Pleading or Motion–Motion for Judgment on the Pleadings.

(a) *When Presented.*

(1) A defendant shall file his or her answer within 30 days after the service of summons and complaint upon him or her. A defendant served under Rule 4(f) shall file an answer within 30 days from the date of first publication of the warning order. A defendant incarcerated in any jail, penitentiary, or other correctional facility in this state, however, shall file an answer within 60 days after service. A party served with a pleading stating a cross-claim or counterclaim against him or her shall file an answer or reply thereto within 30 days after service upon the party. The court may, upon motion of a party, extend the time for filing any responsive pleading.

. . . .

(3) When any case is removed to federal court and subsequently remanded, the plaintiff shall file a certified copy of the order of remand with the clerk of the circuit court and shall forthwith give written notice of such filing to all parties in accordance with Rule 5. Any adverse party shall have 30 days from the receipt of such notice within which to file an answer or a motion permitted under this rule.

. . . .

(f) *Motion to Strike.* Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 30 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

. . . . (Effective July 1, 2011)

Addition to Reporter's Notes, 2011 Amendment: Subdivision (a)(1) has been amended to require that both resident and nonresident defendants file a response within 30 days after service of the summons and complaint. The rule previously required that the resident defendant file the response within 20 days. On occasion the different response times led to the issuance of an incorrect summons by the clerk's office and subsequent issues as to the sufficiency of process. In addition, modern means of communication and electronic transmission diminish the need to distinguish between response times for resident and nonresident defendants. The amendment to subdivision (a)(3) extends to 30 days from the date of receipt of the remand notice the time within which a defendant must respond to a complaint when a case is remanded from federal court. Subdivision 12(f) similarly is amended to require that a motion to strike be filed within 30 days of service of the pleading upon a party.

ARTICLE V. DEPOSITIONS AND DISCOVERY

Rule 30. Depositions upon oral examination.

. . . .

(f) *Certification by Officer; Exhibits; Copies; Notice of Filing.*

. . . .

(2) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain, for the period established for transcripts of court proceedings in the retention schedule for official court reporters, stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent; provided that it shall be the duty of the party causing the deposition to be taken to furnish one copy of the transcript, or if the deposition was recorded solely by sound or sound-and-visual as provided for in Rule 30(b)(3), a copy of the recording, to any opposing party, or in the event there is more than one opposing party, a copy may be filed with the clerk for the use of all opposing parties, and the party filing the deposition shall give prompt notice of its filing to all other parties. (Effective July 1, 2011)

Addition to Reporter's Notes, 2011 Amendment: Subdivision (f)(2) is revised to clarify that a party taking a deposition is not obligated to provide the opposing party or parties a copy of any sound or sound and video recording of the deposition unless no written transcript was made. Since former subdivision (f)(2) required that the party taking the deposition provide the opposing party a copy of the deposition (if multiple parties, to file a copy with the clerk for use by all parties), the rule could have been read as requiring the party taking the

deposition to incur the additional expense of providing a copy of the nonstenographic sound or sound and video recording in addition to the written transcript. Under the amendment, a party taking a deposition only by sound or sound and video recording is still obligated to provide the opposing party with a copy of the deposition or, in a case involving multiple parties to file a copy for use of all opposing parties.

ARTICLE VIII. COUNSEL; PROVISIONAL AND FINAL REMEDIES; SUITS IN FORMA PAUPERIS

Rule 65. Injunctions and temporary restraining orders.

(a) *Preliminary Injunction.*

(1) *Notice.* The court may issue a preliminary injunction only on notice to the adverse party.

(2) *Consolidating the Hearing with the Trial on the Merits.* Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

(b) *Temporary Restraining Order.*

(1) *Issuing Without Notice.* The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) *Contents; Expiration.* Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

(3) *Expediting the Preliminary-Injunction Hearing.* If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

(4) *Motion to Dissolve.* On 2 days' notice to the party who obtained

the order without notice—or on shorter notice set by the court—the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

(c) *Security.* The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. Neither the State of Arkansas, its officers, nor its agencies are required to give security.

(d) *Contents and Scope of Every Injunction and Restraining Order.*

(1) *Contents.* Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued;

(B) state its terms specifically; and

(C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.

(2) *Persons Bound.* The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys; and

(C) other persons who are in active concert or participation with the parties and the parties' officers, agents, servants, employees, and attorneys. (Effective July 1, 2011)

Addition to Reporter's Notes, 2011 Amendment: Rule 65 has been completely rewritten and is now substantially identical to Federal Rule 65 as amended in 2009. Rule 65 as adopted in 1979 departed significantly from the corresponding federal rule. Contrary to the approach of the federal rule and that of most states, the original Arkansas Rule 65 treated preliminary injunctions and temporary restraining orders as equivalent, allowing issuance of either without notice to the adverse party. Subsections (a) and (b) of the amended rule provide for issuance of a temporary restraining order without notice to the adverse party but require notice to the adverse party prior to issuance of a preliminary injunction.

The amendment eliminates former subsection (a)(2) that limited the availability of *ex parte* injunctive relief in some circumstances. The revised rule provides a number of enhanced procedural protections for persons or entities against whom *ex parte* injunctive relief is sought, including: that an affidavit or verified complaint state specific facts showing the harm that will result to the movant before the adverse party can be heard; that the movant's attorney certify in writing any efforts made to give notice and why notice should not be required; that

a temporary restraining order issued without notice describe the circumstances underlying its issuance; that the temporary restraining order must expire not later than 14 days after entry unless for good cause or with the adversary's consent it is extended; and that the hearing on the temporary restraining order be set for the earliest possible time and take precedence over other matters. In addition, the party against whom the order is issued may appear and move to dissolve or modify the order upon 2 days' notice to the party who obtained the temporary restraining order without notice.

In subsection (c) the amended rule conditions issuance of a preliminary injunction or temporary restraining order on the movant's giving security determined by the court and section (d)(1) prescribes the contents of the injunction or restraining order. Subsection (d) specifies the persons bound by the order.

DISTRICT COURT RULES

Rule 4. Complaint.

A complaint shall be in writing and signed by the plaintiff or his or her attorney, if any. It shall also: (a) state the names of the parties, the nature and basis of the claim, and the nature and amount of the relief sought; (b) warn the defendant to file a written answer with the clerk of the court, and to serve a copy to the plaintiff or his or her attorney, within 30 days after service of the complaint upon him; (c) warn the defendant that failure to file an answer may result in a default judgment being entered against him; (d) recite the address of the plaintiff or his or her attorney, if any; and (e) contain a proof of service form which shall be completed by the person serving the defendant. No separate summons is required.

. . . .

SUMMONS AND NOTICE TO DEFENDANT

You are hereby warned to file a written answer with the clerk of the court within 30 days after the date that you receive this complaint and to send a copy to the plaintiff or to his or her attorney. If you do not file an answer within 30 days, or if you fail to file an answer, a default judgment may be entered against you.

_____

[Signature of Clerk or Judge]

PROOF OF SERVICE

STATE OF ARKANSAS

CITY OF _____

I, _____, hereby certify that I served the within complaint on the defendant, _____, at o'clock _____.m. on _____ 2____, by [state method of service].

_____

[Signature and Office, if any]

Subscribed and sworn to before me this _____ day of _____ 2____,

[To be completed if service is by someone other than sheriff or constable.]

_____

Notary Public or Court Clerk

My Commission Expires: _____

(Effective July 1, 2011)

Rule 6. Contents of answer; time for filing.

(a) *Contents of Answer.* An answer shall be in writing and signed by the defendant or his or her attorney, if any. It shall also state: (1) the reasons for denial of the relief sought by the plaintiff, including any affirmative defenses and the factual bases therefor; (2) any affirmative relief sought by the defendant, whether by way of counterclaim, set-off, cross-claim, or third-party claim, the factual bases for such relief, and the names and addresses of other persons needed for determination of the claim for affirmative relief; and (3) the address of the defendant or his or her attorney, if any.

(b) *Time for Filing Answer or Reply.* A defendant shall file an answer with the clerk of the court within thirty (30) days after the service of the complaint upon the defendant. An answer to a cross-claim and a reply to a counterclaim shall be filed with the clerk of the court within 20 days of the date that the pleading asserting the claim is served. A copy of an answer or reply shall also be served on the opposing party or parties in accordance with Rule 5(b) of the Rules of Civil Procedure.

. . . . (Effective July 1, 2011)

Rule 10. Procedure in small claims division.

(a) *Commencement of action — Form of claim and notice to defendant.*

(1) Actions in the small claims division of district court shall be commenced whenever the claimant or the personal representative of a deceased claimant shall file with the clerk of the court a claim in substantially the following form:

In the District Court of _____, State of Arkansas

Small Claims Division

. . . .

SUMMONS AND NOTICE TO DEFENDANT

You are hereby warned to file a written answer with the clerk of this court within thirty (30) days after you receive this claim and forward a copy to the plaintiff at the address above or a default judgment may be entered against you.

_____ (Signature of Clerk or Judge)
_____ District Court Clerk
Address: _____

RETURN OF SERVICE

STATE OF ARKANSAS
COUNTY OF _____
I, _____, certify that I served the within Claim Form on the defendant, _____, at ____ o'clock ____.m. on _____, 2____, by _. _ (Show manner of service)
_____
Name and Office, if any
Subscribed and sworn to before me this ____ day of _____, 2____,
(To be completed if service by other than a Sheriff, Constable, or Clerk)

_____
Notary Public

My commission expires: _____

(2) *Preparation, etc., of claim form.* The plaintiff shall prepare the claim form as is set forth in this rule. The claim form shall be presented by the plaintiff in person. Upon receipt of the claim form and filing fee, the clerk shall file the claim form and proceed to assist the plaintiff in obtaining service on the defendant. In all cases, a copy of the answer in substantially the same form as set forth in this rule shall be included by the clerk with the claim form to be served on the defendant.

(3) *Service of process.*

(A) Unless service by the sheriff or other authorized person is requested by the plaintiff, the defendant shall be served by certified mail.

(B) The clerk shall enclose a copy of the claim form in an envelope addressed to the defendant at the address stated in the claim form, prepay the postage, the cost of which may be collected from the plaintiff at time of filing, and mail the envelope to the defendant by certified mail and request a return receipt from addressee only. The clerk shall attach to the original claim form the receipt for the certified letter and the return card thereon or other evidence of service of the claim form. No separate summons is required.

(C) Service hereunder shall be in accordance with Rule 4 of the Arkansas Rules of Civil Procedure.

(b) *Answer by defendant.* A defendant shall file an answer with the clerk of the court within thirty (30) days after the service of the claim form upon the defendant. The defendant shall mail a copy of the answer to the plaintiff.

. . . .

Official Form of Summons

The Supreme Court of Arkansas has adopted the following form of summons for use in all cases in which personal service is to be had pursuant to Rule 4(c), (d) and (e) of the Arkansas Rules of Civil Procedure. The form may be modified as needed in special circumstances. Additional notices, if required, should be inserted in the appropriate space. This form is not for use in cases of constructive service pursuant to Rule 4(f). The adoption of this form is in compliance with Rule 4(b) and does not modify or amend any part of that rule.

IN THE CIRCUIT COURT OF _____
COUNTY, ARKANSAS

SUMMONS

Plaintiff: Court Division

_____

[or other appropriate court data]

[If not represented by an attorney, give address]

vs.

Defendant: Case Number: _____

_____

Plaintiff's attorney: _____

[name and address] _____

THE STATE OF ARKANSAS TO DEFENDANT:

_____

NOTICE

1. You are hereby notified that a lawsuit has been filed against you; the relief asked is stated in the attached complaint.

2. The attached complaint will be considered admitted by you and a judgment by default may be entered against you for the relief asked in the complaint unless you file a written answer or a motion under Rule 12 of the Arkansas Rules of Civil Procedure and thereafter appear and present your defense. Your pleading or answer must meet the following requirements:

A. It must be in writing, and otherwise comply with the Arkansas Rules of Civil Procedure.

B. It must be filed in the court clerk's office within 30 days from the day you were served with this summons.

3. If you desire to be represented by an attorney you should immediately contact your attorney so that a response can be filed for you within the time allowed.

4. Additional notices:

Answer by defendant. A defendant shall file an answer with the clerk of the court within thirty (30) days after the service of the claim form upon the defendant. The defendant shall mail a copy of the answer to the plaintiff.

Witness my hand and the seal of the court this _____.

(date)

Address of Clerk's Office:

_____ Address of Clerk's Office:

Clerk

[SEAL]

(The appropriate return of service may be on the same page.)

(Effective July 1, 2011)

ADMINISTRATIVE ORDERS OF THE SUPREME COURT

Administrative Order No. 14 — Administrative of Circuit Courts

. . . .

3. *Administrative Plan.*

. . . .

a. *Case Assignment and Allocation.*

. . . .

(2) Cases in a subject-matter division may be exclusively assigned to particular judges, but such assignment shall not preclude judges from hearing cases of any other subject-matter division. (Effective April 21, 2011)

Administrative Order No. 15 — Attorneys.

15.1. Qualifications and Standards for Attorneys Appointed to Represent Children and Parents.

. . .

15.2. Pro Bono Legal Services by Non-admitted Licensed Attorneys.

(a) *Authorization to Provide Pro Bono Services.* Notwithstanding the limitations on practice for attorneys who are not licensed by the State of Arkansas, non-admitted attorneys are authorized to provide pro bono legal services in this state as set out in this order. This order constitutes legal authorization for purposes of Ark. R. Prof. Conduct 5.5 (d)(2).

(1) The attorney must be licensed in another state or the District of Columbia and be in good standing in that jurisdiction.

(2) The attorney shall provide his or her services without charge or an expectation of a fee to persons of limited means who have been referred to the attorney by an authorized sponsoring entity as set out in subsection (b) and only through such referrals.

(3) The volunteer attorney shall complete any appropriate training required by the sponsoring entity and shall additionally comply with the Continuing Legal Education requirements of any state in which the attorney holds a current license to practice law.

(4) If the volunteer attorney's services for a client require a court appearance, the attorney shall comply with the appearance requirements of Rule XIV of the Rules Governing Admission to the Bar and/or the procedure of the applicable forum, even if the attorney resides inside the State of Arkansas.

(5) The volunteer attorney agrees to be bound and subject to all applicable Arkansas Rules of Professional Conduct.

(b) *Sponsoring Entity.* When providing pro bono services pursuant to this provision, attorney's representation shall be under the auspices of a sponsoring entity. The sponsoring entity shall be a legal aid services provider that represents Arkansas clients, namely Legal Aid of Arkansas, Inc., Center for Arkansas Legal Services, Inc., Lone Star Legal Aid, Inc., or such other entity as may be approved by the Arkansas Supreme Court, and shall:

(1) make the volunteer attorney aware of the sponsoring entity's resources that may be of assistance to the attorney;

(2) maintain a log on an annual basis of all volunteer attorneys providing legal services through that sponsoring entity; and

(3) provide professional malpractice insurance covering the volunteer attorney's services if the volunteer attorney is not otherwise

covered by professional malpractice insurance. (Effective March 31, 2011)

(Proposed) Administrative Order Number 19 – Access to Court Records

. . . .

Section IV. General Access Rule.

. . . .

C. If a court record, or part thereof, is rendered confidential by protective order, by this order, or otherwise by law, the confidential content shall be redacted or sealed, but there shall be a publicly accessible indication of the ~~fact of~~ redaction or sealing. This subsection (C) does not apply to court records that are rendered confidential by expungement or other legal authority that expressly prohibits disclosure of the existence of a record.

. . . .

Section VII. Court Records Excluded From Public Access.

~~A. *Case records.*~~ The following information in court ~~case~~ records is ~~excluded from public access and is~~ generally confidential, absent a court order to the contrary, and shall be redacted or filed under seal pursuant to rules of court, including, Ark. R. Civ. P. 5.1, Ark. R. Crim. P. 1.9, and Ark. Sup. Ct. R. 1-8:

A. Social security or taxpayer-identification numbers;

B. A person's birth date;

C. The name of a person known to be a minor;

D. Account numbers of specific assets, liabilities, accounts, credit cards, and personal identification numbers (PINS);

E. All home and business addresses of petitioners who request anonymity when seeking a domestic order of protection pursuant to Ark. Code Ann. § 9-15-202;

F. Information in adoption records pursuant to Ark. Code Ann. § 9-9-217;

G. Information in juvenile records pursuant to Ark. Code Ann. § 9-27-309; and

H. Information that has been expunged, sealed, or otherwise excluded from public access by court order or rule of court.

However, if the information is disclosed in open court and is part of a verbatim transcript of court proceedings or included in trial transcript source materials, the information is not excluded from public access.

~~(1) information that is excluded from public access pursuant to federal law;~~

~~(2) information that is excluded from public access pursuant to the Arkansas Code Annotated;~~

~~(3) information that is excluded from public access by order or rule of court;~~

~~(4) Social Security numbers;~~

~~(5) account numbers of specific assets, liabilities, accounts, credit cards, and personal identification numbers (PINs);~~

~~(6) information about cases expunged or sealed pursuant to Ark. Code Ann. § 16-90-901 et seq.;~~

~~(7) notes, communications, and deliberative materials regarding decisions of judges, jurors, court staff, and judicial agencies;~~

~~(8) all home and business addresses of petitioners who request anonymity when seeking a domestic order of protection.~~

~~B. Administrative Records. The following information in administrative records is excluded from public access and is confidential absent a court order to the contrary:~~

~~(1) information that is excluded from public access pursuant to Arkansas Code Annotated or other court rule;~~

~~(2) information protected from disclosure by order or rule of court.~~

RULES OF THE SUPREME COURT AND COURT OF APPEALS OF THE STATE OF ARKANSAS

ARTICLE I. GENERAL RULES AND PROCEEDINGS

(Proposed) Rule 1-8. Redacting and sealing court records.

(a) *Purpose.* This rule governs procedural issues related to the redacting and sealing of court records arising under (1) Administrative Order Number 19, (2) rules or statutes restricting public access to court records, and (3) a court's inherent power to seal court records. This rule applies to matters sealed by a trial court that are sought to be filed and sealed in the Supreme Court or Court of Appeals and to matters that are sought to be sealed in the first instance in the appellate court.

(b) *Redacted filings.* Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number or birth date, the name of an individual known to be a minor, a financial-account number, or the addresses of a person requesting anonymity when seeking an order of protection pursuant to Ark. Code Ann. § 9-15-203, a party or nonparty making the filing shall:

(1) include only the last four digits of the social-security number or taxpayer-identification number;

(2) include only the year of the individual's birth;

(3) include only the minor's initials (subject to Rule 6-3);

(4) include only the last four digits of the financial-account number; and

(5) redact any address of the person requesting anonymity when seeking an order of protection.

When redacting information, the point in the filing at which the redaction is made shall be indicated by striking through the redacted

material with an opaque black mark or by inserting some explanatory notation in brackets, such as: [Information Redacted], [I.R.], [Confidential], or [Subject To Protective Order]. The requirement that the redaction be indicated in case records shall not apply to court records made confidential by expungement or other legal authority that expressly prohibits disclosure of a record's existence. If ordered by the court, a person making a redacted filing may be required to file an unredacted copy under seal, and the court must retain the unredacted copy as part of the record.

(c) *Other confidential information.* See Supreme Court Rules 4-3 (f) (child pornography) and Rule 6-3 (anonymity, including adoption and juvenile records).

(d) *Request to seal in the appellate court.* Upon motion, the appellate court may order that a filing be made under seal when required by law or for other good cause. A court should not seal the part of a filing when a redaction is reasonable under the circumstances.

(e) *Authorization to Provide Pro Bono Services.* Notwithstanding the limitations on practice for attorneys who are not licensed by the State of Arkansas, non-admitted attorneys are authorized to provide pro bono legal services in this state as set out in this order. This order constitutes legal authorization for purposes of Ark. R. Prof. Conduct 5.5 (d)(2).

(1) *Motion to seal court record.* A party, or a person affected by the information sought to be sealed, may move the Supreme Court or Court of Appeals to seal a document or other item that was not sealed by the trial court, or which was sealed by the trial court but the duration of the seal has expired, by filing a written motion pursuant to Rule 2-1 of these rules. The request to seal must specify the document or item to be sealed, the legal basis on which the request is made, an explanation why redaction is not reasonable, and how long the material should be sealed. The parties' agreement alone does not constitute a sufficient basis for the court to seal a document or other item. [See Rules 4-3 (f) (child pornography) and 6-3 (anonymity) of these rules for requirements for these specific circumstances.]

(2) *Access to court record while motion pending.* After a motion to seal has been filed, the information sought to be sealed shall remain confidential until the court rules on the motion. The motion may be treated on an expedited basis pursuant to Rule 6-1 (b).

(3) *Scope and duration of order.* In an order sealing a document or other item in a case, the Supreme Court and Court of Appeals shall use the least restrictive means and duration. A sealed court record may be unsealed upon a showing of good cause.

(4) *Procedures for maintaining sealed court records.* When a document or other item in a case is filed under seal in the Supreme Court or Court of Appeals, the clerk shall restrict access to the sealed material.

If the sealed record exists in a storage medium form other than paper, the clerk shall restrict access to the alternate storage medium to prevent unauthorized viewing of the sealed material. An entire case file should not be sealed. Unless otherwise prohibited, the following information shall be available for public viewing on court indices:

(A) the case number(s) or docket number(s);

(B) the date that the case was filed;

(C) the name of the document;

(D) names of the parties and counsel of record (except for cases sealed pursuant to Rule 6-3);

(E) the notation "case sealed"; and

(F) the order to seal.

(f) *Protective Orders.* For good cause, the court may by order in a case:

(1) require redaction or sealing of information;

(2) permit access to information to which public access is prohibited (see Administrative Order Number 19, Section (VIII)); or

(3) limit or prohibit a nonparty's remote electronic access to information filed with the court.

(g) *Waiver.* A party or other person waives the protection of this rule as to his or her own information by filing it without redaction and not under seal unless relief is subsequently granted by the court.

ARTICLE IV. BRIEFS

Rule 4-2. Contents of briefs.

. . . .

(b) *Insufficiency of appellant's abstract or addendum.* Motions to dismiss the appeal for insufficiency of appellant's abstract or addendum will not be recognized. Deficiencies in the appellant's abstract or addendum will ordinarily come to the court's attention and be handled in one of four ways as follows:

. . . .

(4) If the appellate court determines that deficiencies or omissions in the abstract or addendum need to be corrected, but complete rebriefing is not needed, then the court will order the appellant to file a supplemental abstract or addendum within seven calendar days to provide the additional materials from the record to the members of the appellate court. (Effective March 31, 2011)

ARTICLE VI. SPECIAL PROCEEDINGS

Rule 6-7. Taxation of costs.

. . . .

(b) *Reversal.* The appellant may recover (1) brief costs not to exceed $3.00 per page with total costs of the brief not to exceed $1000.00, (2) the filing fee of $150.00 and the technology fee of $15.00, (3) the circuit

clerk's costs of preparing the record, and (4) the court reporter's cost of preparing the transcript.

(c) *Affirmed in part and reversed in part.* The Court may assess appeal costs according to the merits of the case.

(d) *Imposing or withholding costs.* Whether the case be affirmed or reversed, the Court will impose or withhold costs in accordance with Rule 4-2(b). (Effective July 1, 2011)

Explanatory Note, 2011 Amendment: Ark. Code Ann. § 21-6-416 added a technology fee to be charged by the clerk of the Supreme Court, and it may be recovered as a cost.

Rule 6-9. Rule for appeals in dependency-neglect cases.

(a) *Appealable Orders.*

(1) The following orders may be appealed from dependency-neglect proceedings:

(A) adjudication order;

(B) disposition, review, no reunification, and permanency planning order if the court directs entry of a final judgment as to one or more of the issues or parties based upon the express determination by the court supported by factual findings that there is no just reason for delay of an appeal, in accordance with Ark. R. Civ. P. 54(b);

(C) termination of parental rights;

(D) denial of right to appointed counsel pursuant to Ark. Code Ann. § 9-27-316(h); and

(E) denial of a motion to intervene.

(2) The circuit court shall enter and distribute to all the parties all dependency-neglect orders no later than thirty (30) days after a hearing.

(d) . . . . (Effective July 1, 2011)

Explanatory Note, 2011 Amendment: The amendment adds denial of a motion to intervene in dependency-neglect proceedings to the list of appealable orders under the expedited appeal procedure of Rule 6-9.

PROCEDURES OF THE ARKANSAS SUPREME COURT REGULATING PROFESSIONAL CONDUCT OF ATTORNEYS AT LAW

SECTION 1. SCOPE.

(a) *Purpose.* These Procedures are promulgated for the purpose of regulating the professional conduct of attorneys at law and shall apply to complaints filed and formal complaints instituted against attorneys after the effective date of these Procedures, and within the purview of the jurisdiction and the authority of the Arkansas Supreme Court Committee on Professional Conduct. From the effective date hereof, these Procedures shall apply to transfers to inactive status, to rein-

statements, and to the extent that limitations and special requirements pertain, to attorneys presently suspended, disbarred or who have surrendered their law licenses. Every attorney now or hereafter licensed to practice law in the State of Arkansas shall be a member of the Bar of this State and subject to these Procedures. The jurisdiction of the Supreme Court Committee on Professional Conduct shall extend to lawyers in active, inactive or suspended status.

(b) *Rules of professional conduct adopted.* The court has adopted the Model Rules of Professional Conduct of the American Bar Association, as amended, known now as the Arkansas Rules of Professional Conduct (the "Rules"), as the standard of professional conduct of attorneys at law. All attorneys are subject to these Procedures.

(c) *Nature of proceedings.* Disciplinary proceedings are neither civil nor criminal but are *sui generis*.

(d) *Repealer.* To the extent that former rules or existing provisions of the Arkansas Code Annotated are in conflict with these Procedures, they are hereby overruled and superseded. These Procedures shall not be deemed exclusive of, but supplemental to, those provisions of the Arkansas Code Annotated with which the Procedures are not in conflict. (Effective May 26, 2011)

SECTION 2. DEFINITIONS.

As used in these Procedures, unless the context otherwise requires:

A. "CLERK" means the Clerk of the Arkansas Supreme Court.

B. "COMMITTEE" means the Arkansas Supreme Court Committee on Professional Conduct.

C. "COMPLAINANT" means the person(s) initiating a complaint, the Executive Director when acting at his or her own instance, or the Committee when acting at its own instance or on behalf of another in initiating a complaint.

D. "COMPLAINT" means an inquiry, allegation, or information of whatever nature and in whatever form received by, coming to the attention of, or initiated by the Office of Professional Conduct or the Committee and concerning the conduct of a person subject to the jurisdiction of the Committee.

E. "FORMAL COMPLAINT" means a complaint directed to an attorney by the Office of Professional Conduct setting forth the alleged violation(s) of the Rules and informing the attorney of the right to file a written response.

F. "LESSER MISCONDUCT" is defined in Section 17(C).

G. "OFFICE OF PROFESSIONAL CONDUCT" means the staff office managed and supervised by the Executive Director, which is responsible for receiving and investigating all complaints concerning members of the Arkansas Bar, filing formal complaints, presenting cases in

hearings before the Committee panels, and litigating cases from the Committee before any court of this State.

H. "RESPONDENT" or "RESPONDENT ATTORNEY" means an attorney against whom a formal complaint has been initiated, whether or not the attorney has failed to file a written response.

I. "RULES" means the former Model Rules of Professional Conduct of the American Bar Association, as amended, and, after May 1, 2005, the Arkansas Rules of Professional Conduct, and any statutory provisions or rules adopted by the Arkansas Supreme Court regulating the professional conduct of attorneys at law.

J. "SERIOUS CRIME" means (1) any felony, (2) any lesser crime that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or (3) any crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft or an attempt, conspiracy or solicitation of another to commit a "serious crime."

K. "SERIOUS MISCONDUCT" is defined in Section 17(B).

L. "SUBSTANTIAL," when used for the purposes of these Procedures in reference to degree or extent, means beyond mere suspicion or conjecture and of sufficient force and character to compel a conclusion one way or another with reasonable and material certainty and precision.

M. "UNAVOIDABLE CIRCUMSTANCES" means circumstances not attributable to negligence, carelessness, fault, or the lack of diligence on the part of the respondent attorney. (Effective May 26, 2011)

SECTION 3. COMMITTEE ON PROFESSIONAL CONDUCT.

A. *Composition / Term of Office.*

(1) The Supreme Court shall appoint the members of the Committee on Professional Conduct to assist in enforcing these Procedures. The Committee shall consist of two separate seven-member panels, designated Panel A and Panel B. Each panel will include five attorneys, one chosen from the State at large and one from each of the four Congressional Districts. Two non-attorneys will be chosen to serve on each panel, and these four lay members will be chosen from the State at large. Each appointment shall be for a term of six years, unless otherwise designated by the Supreme Court. Members may be reappointed to one successive six-year term. Terms shall be staggered. Vacancies occurring from causes other than expiration of term of office will be filled by the Supreme Court as they occur, and the person so appointed shall serve the remainder of his or her predecessor's term. If the remainder of the vacant term is less than two years, the person

appointed is eligible for appointment to two successive six-year terms. Committee members shall serve until their successors are appointed and certified. The Committee shall elect one of its members as Chairperson and another as Secretary. The Committee, consistent with these Procedures, may adopt such internal operating rules and policies as may be necessary to facilitate the performance of its duties, responsibilities, and administrative functions. All such internal operating rules and policies shall be provided to all Committee members.

(2) Members shall refrain from taking part in any disciplinary proceeding in which a judge similarly situated would be required to recuse.

(3) Fourteen reserve members shall be appointed to serve as Panel C and Panel D, a pool from which replacements may be drawn in those instances in which members of the Committee are disqualified or unable to serve. Ten of the reserve members shall be lawyers with at least two from each Congressional District. Four of the reserve members shall not be lawyers and shall be selected from the State at large. In other respects, the terms of service for reserve members shall be the same as provided for the Committee. Reserve members shall possess the authority, powers, immunities, and entitlements provided for the Committee by these Procedures. The Committee Chairperson or Executive Director shall select reserve members from a rotating list to serve, individually or collectively, as the situation requires, in those instances in which members of a panel of the Committee consider themselves disqualified or are unable to serve. Reserve members serving as replacements shall be selected so as to maintain the appropriate lawyer/non-lawyer composition. Reserve members do not have to be selected unless the required quorum of the Committee or a panel thereof is not present. If necessary, the Supreme Court may appoint additional persons to serve as reserve members to permit the Committee to discharge its duties.

(B) *Quorum.* A majority of the members of Panels A and B of the Committee shall constitute a quorum for the conduct of Committee business. The Committee shall not sit en banc for disciplinary proceedings.

(C) *Authority/Powers.*

(1) The Committee, through its panels, shall have, and is hereby granted, authority to impose any sanctions deemed appropriate as provided in Section 7 (Procedure), Section 17 (Sanctions), and Section 18 (Fines, Costs, and Restitution).

(2) The Committee, through its panels, is authorized to take action by written ballot, subject to the requirements and limitations set out in Section 10 of these Procedures.

(3) The Committee, through its panels, is authorized to conduct hearings at either:

(a) The request of the panel; or

(b) The request of the respondent attorney after written ballots are taken.

(4) The Committee is authorized to hold meetings to conduct the business of the Committee, which consists of, but is not limited to, the election of officers, the determination of pending complaints, and such administrative matters as required.

(5) The Committee, acting through its Chairperson, may temporarily designate from the staff attorneys of the Office of Professional Conduct an acting Executive Director in any case in which the Executive Director or the Deputy Director (pursuant to Section 5(D)(3)) is unable to act, or recuses, or disqualifies.

(6) The Committee shall maintain a permanent office under the supervision of the Executive Director for the conduct of its business and the maintenance of the various records of the Committee.

(7) The seal heretofore adopted by the Committee shall be the official seal for its use in the performance of the duties imposed by these Procedures.

(8) The Executive Director or the Committee, through its panels, shall have the authority to issue summonses for any person(s), or subpoenas for any witness(es), including the production of documents, books, records, or other evidence, in the same manner as is provided for civil process pursuant to the Arkansas Rules of Civil Procedure, requiring the presence of any person, or the attendance of any witness before the Committee for the purpose of testimony, or in furtherance of an investigation. Such process shall be issued under the seal of the Committee provided for in subsection C(7) of this Section and be signed by the Chairperson of the Committee, the Secretary, the chair of a panel of the Committee, or the Executive Director. Any subpoenas issued herein shall clearly indicate that the subpoenas are issued in connection with a confidential investigation under these Procedures and that it is regarded as contempt of the Supreme Court for a person subpoenaed to breach the confidentiality of the investigation. If found to be in contempt of the Supreme Court under these Procedures, a person may be punished by incarceration, imposition of a fine, or both. In addition, it shall be grounds for discipline under these Procedures for a subpoenaed attorney to breach the confidentiality of the investigation. It shall not be regarded as a breach of confidentiality for a person subpoenaed to seek or consult with legal counsel in regard to the subpoena, nor shall the confidentiality apply to subpoenas issued in connection with a public hearing.

(9) The Committee, through the Chairperson or a panel chair, or the Executive Director, may seek immunity from criminal prosecution for a reluctant witness, using the procedure of Ark. Code Ann. §§ 16-43-601

to -606 (1987), as amended, and any successor or other applicable statute.

(10) The Committee may propose changes to these Procedures for promulgation by the Supreme Court and may comment on existing and proposed Rules.

(11) The Committee shall periodically review the operation of the system with the Supreme Court.

(12) The Committee, working with the Office of Professional Conduct, shall inform the public about the existence and operation of the system and the disposition of each matter in which public discipline has been imposed, a lawyer has been transferred to or from disability inactive status, or a lawyer has been reinstated. Communication options should include toll-free telephone and the Internet.

(13) The Committee shall perform administrative oversight over the Office of Professional Conduct which shall include: reviewing the productivity and efficiency of the office; assessing caseload management; reviewing and making recommendations concerning budgetary matters; making recommendations to the Executive Director; and improving the statistical records of the office. Administrative responsibilities may be delegated to panels of the Committee on a rotating basis, which may include an Executive Committee selected by the Committee.

(14) When so requested by a federal judge under the Uniform Federal Rules of Disciplinary Enforcement adopted by the United States District Courts of Arkansas on May 1, 1980, or successor rules, the Committee may act as the disciplinary agency, and the Executive Director as counsel, in a federal disciplinary action. Any additional expense incurred in the processing of a federal complaint will be paid from the funds arising from the assessments levied pursuant to the Uniform Federal Rules and available for that purpose. When final action is taken under a federal complaint, a report of that action will be made to the federal judge who referred the matter, and the Committee may also furnish to the federal judge any other information from its files necessary to fulfill its duties as disciplinary agency.

(D) *Immunity.* The Committee, its individual members, its agents, the Executive Director, and employees and agents of the Office of Professional Conduct are absolutely immune from suit or action for their activities in discharge of their duties under these Procedures, to the full extent of judicial immunity in Arkansas.

(E) *Expenses.* From the funds established and appropriated by the Arkansas Supreme Court, and in accordance with budgetary limitations, members of the Committee shall be entitled to receive their travel and hotel expenses, reimbursement for postage, stationery, communications, an attendance allowance, other incidental expenses including stenographic bills and court costs chargeable against them, and to

attend training and continuing education programs. All such items shall be paid by the Clerk by check on such funds. Accounts must be itemized and certified by the Chairperson of the Committee, the Secretary, or the Executive Director as true and correct and for the official business of the Committee or the Office of Professional Conduct. (Effective May 26, 2011)

SECTION 4. COMMITTEE PANELS.

A. *General.* The Committee may delegate to its panels the power to act for the Committee in discharging its powers and duties. The Committee or the Executive Committee shall establish the method of rotation by which panels are assigned complaints.

B. *Panels.* Each panel shall elect a lawyer member of that panel as its chair. A panel member whose term has expired may continue to serve on any case that was commenced before the expiration of the member's term. Five members shall constitute a quorum. The panel shall act only with the concurrence of at least four members. Reserve members may be appointed to serve on a panel pursuant to Section 3(A)(3).

C. *Powers and Duties.* Panels shall have the following powers and duties:

(1) To conduct proceedings during the ballot phase concerning formal complaints of misconduct, petitions for reinstatement, and petitions for transfer to and from disability inactive status;

(2) To conduct hearings;

(3) To adopt written findings of fact, conclusions of law, and orders prepared with the administrative assistance of the Office of Professional Conduct; and

(4) To discharge other duties imposed by these Procedures. (Effective May 26, 2011)

SECTION 5. OFFICE OF PROFESSIONAL CONDUCT.

A. *General.* The Supreme Court shall employ the Executive Director of the Office of Professional Conduct, who shall be an attorney actively licensed to practice law in the State of Arkansas, shall serve at the will of the Court, and shall devote full time and effort to promptly and efficiently perform the duties stated in this Section, and such other duties as directed by the Court or the Committee.

B. *Duties-Office.*

(1) The Executive Director may attend and, at the request of the Committee, act as counsel in presenting testimony and other evidence at any hearing pursuant to these Procedures.

(2) The Executive Director, or, in his or her absence or disqualification from a case, the acting Executive Director, shall have power to administer oaths in all matters incident to the duties imposed by these

Procedures, and such power and authority shall be coextensive with the State.

(3) The Executive Director shall be responsible for the administration of the business office and the security of the records. As authorized by and upon such terms as the Court shall direct, the Executive Director may employ such personnel, including staff attorneys, investigators, and temporary employees, and may retain independent counsel, as may be required to perform the administrative, investigative, and legal functions of the Committee and the Office of Professional Conduct. The Executive Director and the professional staff of the Office of Professional Conduct shall periodically attend training and continuing education programs.

(4) The Executive Director shall receive reports from financial institutions pursuant to Rule 1.15(d)(1) indicating that a properly payable instrument has been presented against a lawyer's trust account containing insufficient funds, irrespective of whether or not the instrument is honored, and take appropriate action in response to such information.

C. *Duties-Complaints*

(1) It shall be the duty of the Office of Professional Conduct to receive and investigate all complaints against any member of the Bar. Such complaints shall be docketed and assigned a permanent file number. The Office of Professional Conduct and the Committee may accept and treat as a complaint any writing signed by a judge of a court of record in this State regardless of whether such signature is verified or any per curiam order or opinion issued by any appellate court. The Executive Director may initiate a complaint at his or her own instance.

(2) In lieu of filing and serving a formal complaint, the Executive Director may refer matters involving lesser misconduct, as defined in Section 17(C), to alternatives-todiscipline programs approved by the Supreme Court. Such programs may include, in addition to the Arkansas Judges and Lawyers Assistance Program, programs for fee arbitration, arbitration, mediation, law office management assistance, psychological counseling, continuing education, and ethics.

(3) Upon a determination by the Executive Director that a complaint sets out allegations falling within the purview of the Committee and that those allegations are supported by sufficient evidence, the Executive Director shall provide any assistance needed in the preparation of the complainant's affidavit and shall process a formal complaint pursuant to these Procedures.

(4) If the Executive Director determines that a complaint does not set forth sufficient grounds to reasonably support preparation of a formal complaint but contains information indicative of a misunderstanding or controversy between an attorney and a client or a third party who may

be aggrieved by the conduct or circumstances and the best interests of the integrity of the profession and the valid concerns of the complainant would be served by reconciliation or communication between the parties, the Executive Director may, at the request of the complainant or in the judgment of the Executive Director, contact the attorney by telephone or letter advising the attorney of the nature of the complaint and may attempt an informal resolution. Such a procedure will not be considered a formal complaint.

(5) Review of the Executive Director's Decision.

(a) A complainant who is not satisfied with the Executive Director's determination that the allegations of the complaint fall outside the purview of the Committee or that the allegations are not supported by sufficient evidence to file a formal complaint may request a review of that determination by Panel C.

(b) The request for review shall be filed with the Executive Director in writing within twenty (20) days from the date of mailing of the letter to the address provided by the complainant in the grievance or other document of initial complaint, unless notified by the complainant in writing of a new address prior to the mailing of the letter, notifying the complainant of the determination of the lack of a basis for filing a formal complaint.

(c) The written request will set out in general terms the complainant's grounds for objection to the Executive Director's decision.

(d) Upon receipt of a request for review, the Executive Director will acknowledge in writing the request and shall forward the complaint information, including the complainant's grounds for objection to the Executive Director's decision, to five members of Panel C, one of whom will be a nonlawyer, directing that they review the Executive Director's disposition of the matter.

(e) The reviewing members, by majority vote, may (1) approve the Executive Director's disposition of the matter, (2) direct that a formal complaint be prepared, or (3) request further investigation of the matter by the Executive Director. Votes may be taken by written ballots on forms supplied by the Office of Professional Conduct or by telephone. With the administrative assistance of the Office of Professional Conduct, the result of the vote will be made known to the Executive Director by the chair of Panel C. If a formal complaint is instituted, members of the five-member reviewing body shall not participate in subsequent proceedings in the matter.

(f) The Executive Director shall then notify the complainant in writing of the results of the review and dismiss the complaint, initiate a formal complaint, or investigate further, as appropriate.

(g) There shall be no further review or appeal of Panel C's final decision on a review.

D. *Staff Attorneys.*

(1) All Staff Attorneys employed by the Executive Director shall be actively licensed to practice law in the State of Arkansas.

(2) Staff Attorneys shall serve at the direction and pleasure of the Executive Director and may perform all duties and possess all authority of the Executive Director as the Executive Director may delegate, except for the final determination of sufficiency of formal complaints and the authority and responsibilities provided in Sections 3(C)(8) (subpoenas) and 5(B)(2) (oaths), which authority may be exercised by the acting Executive Director in the absence of, or upon the disqualification from a case by, the Executive Director.

(3) In the event of the temporary inability of the Executive Director to fully discharge the duties of office, or when a vacancy exists in that office, the Deputy Director shall discharge such duties as the acting Executive Director. If the Executive Director determines that a conflict of interest exists for the Executive Director with regard to a particular complaint, complainant, or respondent, the Executive Director may recuse from the matter, and the Deputy Director shall discharge such duties as the acting Executive Director for that matter.

E. *Compensation / Expenses.* The Executive Director and staff of the Office of Professional Conduct shall be paid such reasonable salary and expenses as deemed necessary and appropriate by the Supreme Court. Employee salaries, benefits, and expenses of the Office shall be payable from funds budgeted to the Committee by the Supreme Court. (Effective May 26, 2011)

SECTION 6. CONFIDENTIALITY/RECORDS.

A. *Communications Confidential.* Subject to the exceptions listed in subsections B and C of this Section:

(1) All communications, complaints, formal complaints, testimony, and evidence filed with, given to, or given before the Committee, or filed with or given to any of the employees and agents of the Office of Professional Conduct during the performance of their duties, that are based upon a complaint alleging an attorney has violated the Rules, shall be absolutely privileged and confidential and exempt from disclosure under the Arkansas Freedom of Information Act, Ark. Code Ann. §§ 25-19-101 *et seq.*, pursuant to Ark. Code Ann. § 25-19-105(b)(8), as documents protected from disclosure by order or rule of the Supreme Court of Arkansas; and

(2) All actions and activities arising from or in connection with an alleged violation of the Rules by an attorney licensed to practice law in this State are absolutely privileged and confidential.

(3) These provisions of privilege and confidentiality shall apply to complainants.

B. *Exceptions.*

(1) Except as expressly provided in these Procedures, proceedings under these Procedures are not subject to the Arkansas Rules of Civil Procedure regarding discovery.

(2) The records of public hearings conducted by the Committee pursuant to Section 11 of these Procedures are public information.

(3) In the case of disbarment, the Committee and the Office of Professional Conduct are authorized to release any information that either deems necessary for that purpose.

(4) The Committee is authorized to release information:

(a) For statistical data purposes;

(b) To a corresponding lawyer disciplinary authority or an authorized agency or body of a foreign jurisdiction engaged in the regulation of the practice of law;

(c) To the State Board of Law Examiners;

(d) To the Committee on the Unauthorized Practice of Law;

(e) To the Arkansas Client Security Fund Committee;

(f) To the Commission on Judicial Discipline and Disability;

(g) To any other committee, commission, agency, or body within the State empowered to investigate, regulate, or adjudicate matters incident to the legal profession, when such information will assist in the performance of those duties;

(h) To any agency, body, or office of the federal government or this State charged with responsibility for investigation and evaluation of a lawyer's qualifications for appointment to a governmental position of trust and responsibility or for the discipline or sanction of any attorney; or,

(i) Pursuant to the provisions of Section 9(A) and Section 15(B) of these Procedures

(5) Any attorney against whom a formal complaint is pending shall have disclosure of all information, excluding attorney work product, research, and materials obtained and intended for use as rebuttal to any witness for the respondent attorney at a hearing, in the possession of the Committee and the Office of Professional Conduct concerning that complaint, including any record of prior complaints about that attorney. Procedures for discovery for formal complaints are set out in Section 8.

(6) The attorney about whom a complaint is made may waive, in writing, the confidentiality of the information.

(7) In all cases, the complainant shall be provided with a copy of the respondent attorney's affidavit of response and afforded a reasonable opportunity to reply, in accordance with Section 9(B)(3).

C. *Sanctions Made Public.* When a public sanction becomes final under these Procedures or when the Committee decides to initiate

disbarment proceedings, a copy shall be forwarded to the Clerk and shall be maintained as a public record by the Clerk. Such information shall also be publicly disseminated, including release to the press and posting on the Arkansas Judiciary website. (Effective May 26, 2011)

SECTION 7. PROCEDURE.

A. *General.* A panel of the Committee shall adjudicate all formal complaints alleging violation of the Rules that may be brought to its attention and shall give the attorney involved an opportunity to explain or refute the charge.

B. *Standard of Proof.* Formal charges of misconduct, petitions for reinstatement, and petitions for transfer to or from inactive status shall be established by a preponderance of the evidence.

C. *Burden of Proof.* The burden of proof in proceedings seeking discipline or involuntary transfer to inactive status is on the Executive Director. The burden of proof in proceedings seeking reinstatement or transfer from involuntary or voluntary inactive status is on the attorney seeking such action.

D. *Limitations on Actions.* The institution of disciplinary actions pursuant to these Procedures shall be exempt from all statutes of limitations.

E. *Evidence and Procedures.* Except as noted in these Procedures, the Arkansas Rules of Evidence and the Arkansas Rules of Civil Procedure shall not generally apply to disciplinary proceedings. The Executive Director and all other attorneys submitting documents in disciplinary proceedings shall quote, highlight, or pinpoint cite the portions of exhibits, transcripts, and other submissions on which they want the Committee members to focus, rather than merely submitting voluminous documents without specific references.

F. *Pleadings.* All pleadings filed before the Committee shall be captioned "Before the Arkansas Supreme Court Committee on Professional Conduct" and be styled "In re _____," to reflect the name of the respondent attorney.

G. Prior Sanctions. Information concerning prior discipline of the respondent attorney shall not be divulged to the Committee members hearing or reviewing a complaint until after a finding of misconduct has been made, unless said information is relevant for purposes of impeachment or probative of issues pending in the present matter, including, without limitation, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. [See Ark. R. Evid. 404(b).] If a panel is considering a matter by ballot-vote procedure, information concerning prior discipline of the respondent attorney, which is not subject to disclosure as set out above, shall be provided to the panel members in a sealed envelope accompanying the

ballot, and shall not be unsealed and reviewed by the voting panel member until and unless the panel member shall mark the ballot finding a violation of a Rule.

H. *Ex Parte Communication.*

(1) Members of the Committee shall not communicate *ex parte* with the Executive Director, the staff of the Office of Professional Conduct, the respondent attorney, or his or her counsel regarding a pending or impending investigation or disciplinary matter, except as explicitly provided for by law or these Procedures, or for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits.

(2) A violation of this rule may be cause for removal of any member from the panel before which a matter is pending. (Effective May 26, 2011)

SECTION 8. DISCOVERY AND PREHEARING ISSUES.

A. *Scope.* Within ten calendar days following the filing with the Office of Professional Conduct of a request for a public hearing by a respondent attorney after a ballot vote pursuant to Section 10(D)(3), the Executive Director and the respondent attorney shall exchange the names, addresses, and telephone numbers of all persons having knowledge of relevant facts and of all potential witnesses at the public hearing. Within sixty (60) days following the filing of the request for a public hearing, the Executive Director and the respondent attorney may take depositions in accordance with Arkansas Rule of Civil Procedure 30 and shall comply with reasonable requests for (i) non-privileged information and evidence relevant to the charges or the attorney, and (ii) other material upon good cause shown to the chair of the panel before which the matter is pending for hearing.

B. *Resolution of Prehearing Disputes.*

(1) Disputes concerning discovery shall be determined by the chair of the panel to which the matter was assigned. All discovery orders by the chair are interlocutory and may not be appealed prior to the entry of the final order.

(2) Other prehearing disputes or motions, including a motion to dismiss the complaint, shall be decided by the hearing panel chair, unless the panel chair determines that the dispute or motion should be decided by the full hearing panel. If a motion to dismiss the complaint is denied by the hearing panel chair or by the full hearing panel, that denial shall not be grounds for disqualification or recusal of the chair or any member of the hearing panel deciding the motion.

C. *Rules of Civil Procedure Not Applicable.* Proceedings under these Procedures are not subject to the Arkansas Rules of Civil Procedure regarding discovery, except those rules relating to depositions and

subpoenas. Interrogatories, requests for admissions, and other forms of discovery not specifically authorized in these Procedures are not available in proceedings before the Committee. (Effective May 26, 2011)

SECTION 9. SERVICE OF COMPLAINT/ RESPONSE/ FAILURE TO RESPOND/ RECONSIDERATION.

A. *Service of Complaint.*

(1) Upon the filing of a formal complaint, the Executive Director shall furnish to the attorney complained against a copy of the formal complaint and advise the attorney that he or she may file a written response in affidavit form with any supporting evidence desired. The attorney's mailing address on record with the Clerk shall constitute the address for service by mail. Attorneys shall be responsible for informing the Clerk in writing and within a reasonable time of any change of such address. Certified mailing of the formal complaint to said address shall be deemed a waiver of confidentiality for purposes of Section 9(A)(2)(c).

(2) Service may be effected on a respondent attorney by:

(a) Mailing a copy of the formal complaint to attorney's address of record by certified, restricted delivery, return receipt mail; or,

(b) Personal service, as provided by the Arkansas Rules of Civil Procedure or by an Investigator with the Office of Professional Conduct or by an affidavit of service signed by the respondent attorney; or,

(c) When reasonable attempts to accomplish service by Section 9(A)(2)(a) or Section 9(A)(2)(b) have been unsuccessful, then a warning order, in such form as prescribed by the Committee, shall be published weekly for two consecutive weeks in a newspaper of general circulation within this State or within the locale of the attorney's address of record. In addition, a copy of the formal complaint and warning order shall be sent to the respondent attorney's address of record by regular mail.

(3) An attorney's failure to provide an accurate, current mailing address to the Clerk, as required by Section 9(A)(1), or the failure or refusal to receive certified mailing of a formal complaint, shall be deemed a waiver of confidentiality for the purposes of the issuance of a warning order.

(4) Unless good cause is shown for an attorney's non-receipt of a certified mailing of a formal complaint, the attorney shall be liable for the actual costs and expenses for service or the attempted service of a formal complaint, to include all expenses associated with the effectuation of service. Such sums will be due and payable to the Committee before any response to a formal complaint will be accepted or considered by the Committee.

(5) After service has been effected by any of the aforementioned means, subsequent mailings by the Committee to the respondent attorney may be by regular mail to the attorney's address of record, to

the address at which service was accomplished, or to such address as may have been furnished by the attorney, as the appropriate circumstance may dictate, except that notices of hearings and letters of caution, reprimand, suspension, or initiation of disbarment proceedings shall also be sent by certified, return receipt mail.

(6) Service on a non-resident attorney may be accomplished pursuant to Section 9(A)(2)(a), (b), or (c) or in any manner prescribed by the law of the jurisdiction to which the service is directed.

B. *Time and Manner of Response.*

(1) Upon service of a formal complaint, pursuant to Section 9(A)(2)(a) or Section 9(A)(2)(b), or the date of the first publication, pursuant to Section 9(A)(2)(c), the attorney shall have thirty (30) days in which to file a written response consisting of an original and eight (8) copies with the Executive Director. In the event that the Executive Director has not received a response within thirty (30) days following the date of service and an extension of time has not been granted, the Executive Director shall proceed to issue ballots as provided in Section 10.

(2) At the request of an attorney, the Executive Director is authorized to grant an extension of reasonable length for the filing of a response. Subsequent requests for extensions must be in written form and will be ruled on by the Chairperson of the Committee or the chair of the panel to which the matter has been assigned.

(3) Within ten (10) calendar days of receiving the attorney's response to the complaint, the Executive Director shall provide a copy of the attorney's response to the complainant and may provide a copy of the attorney's response to any other person who has provided an affidavit that was attached to the complaint and advise that the complainant and others have fifteen (15) calendar days in which to rebut or refute any allegations or information contained in the attorney's response. The Executive Director may include any rebuttal made by the complainant and other affiants as a part of the material submitted to the Committee for decision, and any such rebuttal shall be provided to the respondent attorney for informational purposes only, with no response required. If a response or rebuttal to be submitted to the Committee contains allegations or proof of violation of the Rules not previously alleged, it may be placed in the form of a supplemental complaint, and the respondent attorney shall be provided a copy and permitted to respond in the manner prescribed in subsection B(1) of this Section.

(4) The calculation of the time limitations specified in Section 9(B) shall commence on the day following service upon the respondent. If the due date of a response falls on a Saturday, Sunday, or legal holiday, the due date will be extended to the next regular business day.

C. *Failure to Respond/ Reconsideration.*

(1) An attorney's failure to provide, in the prescribed time and manner, a written response to a formal complaint served in compliance

with Section 9(A)(2) shall constitute separate and distinct grounds for the imposition of sanctions less than a suspension of license, without regard for the merits of the underlying, substantive allegations of the complaint; or

(2) May be considered for enhancement of sanctions imposed upon a finding of violation of the Rules.

(3) The separate imposition or the enhancement of sanctions for failure to respond may be accomplished by the panel's notation of such failure in the appropriate sanction order and shall not require any separate or additional notice to the respondent attorney.

(4) Failure to respond to a formal complaint shall constitute an admission of the factual allegations of the complaint and shall extinguish a respondent's right to a public hearing.

(a) Provided, however, that a respondent attorney, within the time specified in Section 10(E)(3), may file with the Executive Director an original and eight (8) copies of a petition for reconsideration, stating, on oath, compelling and cogent evidence of unavoidable circumstances sufficient to excuse or justify the failure to respond. Otherwise, the panel's decision shall be final and will be filed of record with the Clerk. The Office of Professional Conduct may respond to any petition for reconsideration within fifteen (15) days after it is filed.

(b) Upon the filing of a petition for reconsideration and any response, the Executive Director shall provide each member of the panel a copy of the petition and any response for vote by written ballot consistent with provisions of Section 10.

(c) If a majority of the panel, upon a finding of clear and convincing evidence, votes to grant the petition for reconsideration, the panel may:

(i) Permit the attorney to submit a belated affidavit of response to the substantive allegations of the formal complaint and the matter shall proceed as though the response had been made timely; and/or

(ii) Set aside any sanction imposed solely on the basis of the attorney's failure to respond.

(d) If the petition for reconsideration is denied, the panel's original decision and imposition of sanctions become final and will be filed of record with the Clerk. Appeal from the Committee's denial of reconsideration and the imposition of sanctions may be taken in the time and manner prescribed by the applicable provisions of Section 12. Provided, however, that such appeal cannot attack the substantive allegations of the complaint and shall be limited to the panel's denial of reconsideration. (Effective May 26, 2011)

SECTION 10. VOTE BY BALLOT.

A. At such time as the Executive Director has received from the attorney a written response or the attorney has failed to respond within

the period provided in Section (9)(B), the Executive Director shall send a copy of the complaint, the response, any rebuttal, all exhibits, and a separate sealed envelope containing information concerning any prior discipline of the respondent attorney to each member of the seven-member panel to which the matter has been assigned. Each member of the panel shall vote by written ballot.

B. Each ballot shall contain appropriate spaces for:

(1) The name and signature of the panel member;

(2) The date;

(3) The member's vote on the action to be taken on the formal complaint; and,

(4) A place for the members to state which Section(s) of the Rules, if any, are found to be violated.

C. Panels shall meet on a regular basis to consider and take final action as a panel in closed session on all cases requiring a ballot vote. The Executive Director, Staff Attorneys, personnel of the Office of Professional Conduct, and any recusing panel members shall not take part in the deliberations of a panel and shall not attend or participate in panel meetings while the merits of a case are being discussed.

D. If a majority of the panel votes to cause a respondent attorney, complainant, or other person to appear for the purposes of eliciting testimony, production of records and documents, provision of additional information or evidence, or for any other relevant purposes involved with a matter pending before the panel, a hearing will be scheduled, and summonses or subpoenas may issue, as required. Such evidentiary hearing shall not be public, and no adjudicative decision will be pronounced or rendered at that time. The panel, upon written ballot or voice vote, shall proceed under Section 10(E). Any recorded testimony, records, documents, exhibits, or other evidence adduced at an evidentiary hearing may be received and made part of the record at a subsequent public hearing.

E. *Results of Ballot Vote.*

(1) If a majority of the panel votes to take no disciplinary action against a respondent attorney, the panel shall so advise the Office of Professional Conduct, which shall notify the complainant and the respondent attorney by letter stating the result. The Office of Professional Conduct shall file a monthly report of such cases, by number only, as a public record in the office of the Clerk.

(2) If a majority of the panel votes to warn, the Executive Director shall send an appropriate letter to the respondent attorney and the complainant after the letter has been approved by the panel chair. The letter shall inform the respondent attorney which rule(s) the panel found the respondent attorney violated and which allegation(s) of the complaint the panel found to be true. The letter shall also inform the

respondent attorney that he or she has the right, upon written request filed with the Office of Professional Conduct within twenty (20) days of service of the letter, as defined by Section 9(A)(2), to a public hearing before another sevenmember panel of the Committee, no member of which was a member of the original panel, as provided in Section 11. The letter shall also inform the respondent attorney that a warning is not a sanction available at a public hearing. The letter shall also inform the respondent attorney that, if he or she does not file such a written request for a public hearing by the deadline, the warning shall become final. If a warning is issued, the result shall be non-public. No fine, restitution, or costs shall be assessed against the respondent, unless the warning is the result of a discipline by consent. The Office of Professional Conduct shall file a monthly report of such cases, by number only, as a public record in the office of the Clerk.

(3) If a majority of the panel votes to caution, reprimand, or suspend the attorney, the attorney shall be notified of the findings and decision of the panel by a written order setting out the factual findings of the panel and the rules found to have been violated. The order will be approved and signed by the panel chair, and it may be drafted by the Office of Professional Conduct. The attorney shall be advised in writing that he or she has the right, upon written request filed with the Office of Professional Conduct within twenty (20) days of service of the order, as defined by Section 9(A)(2), to a public hearing before another seven-member panel of the Committee, no member of which was a member of the original panel, as provided in Section 11. The attorney shall also be advised that, if he or she does not file such a written request by the deadline, such findings and order of the Committee shall become final, will be entered in the files of the Committee and will be filed as a public record in the office of the Clerk.

(4) If a majority of the panel votes at the ballot vote stage to initiate disbarment proceedings, the Committee shall proceed as set out in Section 13, and there shall be no public hearing before the Committee pursuant to Section 11. If the panel finds that a lawyer has committed acts against a client which constitute theft of property under Ark. Code Ann. § 5-36-103 (or its replacement), regardless of whether the attorney has been convicted, disbarment proceedings must be instituted.

(5) If any findings of fact, conclusions of law, or other recommendations are necessary at the conclusion of the ballot process, they shall be approved and signed by the panel chair, and they may be prepared by the Office of Professional Conduct, with the advice and consent of the panel.

(6) Panels shall meet on a regular basis to consider and take final action as a panel in closed session on all cases requiring a ballot vote. The Executive Director, Staff Attorneys, personnel of the Office of

Professional Conduct, and any recusing panel members shall not take part in the deliberations of a panel and shall not attend or participate in panel meetings while the merits of a case are being discussed. (Effective May 26, 2011)

SECTION 11. PUBLIC HEARING.

A. If a public hearing is properly requested under Section 10, a seven-member panel of the Committee, no member of which was a member of the original ballot-vote panel, will hear the complaint de novo under the rules for public hearings. The ballots and the action of the original panel shall be kept confidential and shall not be made known to the panel which conducts the de novo public hearing.

B. The Executive Director shall set a date for the hearing and shall notify the respondent attorney and the complainant of the hearing date. Once a hearing is set, the granting of any request for a continuance shall be at the discretion of the chair of the panel. The chair of the panel may require a prehearing conference. If a respondent attorney who has requested a hearing and who has been notified properly of the hearing date does not appear at the time and place set for the hearing, the action of the original panel by ballot vote shall become final, and the respondent attorney shall not be entitled to any further review of that action.

C. At the end of the hearing, the panel shall hold an executive session to deliberate upon any disciplinary action to be taken. The findings and decision of the panel shall be announced immediately. The votes of the individual members shall be announced if the decision is not unanimous.

D. If a majority of the panel votes to caution, reprimand, or suspend an attorney, the Office of Professional Conduct shall prepare a proposed order, including findings, which shall be provided to the respondent attorney, who shall have fifteen (15) calendar days after service of the proposed order by first class mail within which to file with the Office of Professional Conduct any objections and alternatives to the proposed language. The Office of Professional Conduct shall provide the proposed order and any objections and alternatives to the panel chair, who will determine and sign the final order. The order shall be filed as a public record in the office of the Clerk.

E. If a majority of the panel votes to initiate disbarment proceedings, the Executive Director shall file an action for disbarment as provided in Section 13. Alternatively, if circumstances require, and with the Supreme Court's approval, the panel may retain independent counsel to prosecute the disbarment proceedings. If the panel finds that a lawyer has committed acts against a client which constitute theft of property under Ark. Code Ann. § 5-36-103 (or its replacement), regardless of

whether the attorney has been criminally charged or convicted, disbarment proceedings must be initiated.

F. The Committee may refer matters involving lesser misconduct to alternatives-to-discipline programs as provided in Section 5(C)(2).

G. *Doctor-Patient Privilege Waived.* Raising the defense of mental or physical disability or incapacity by one who is the subject of a disciplinary proceeding shall constitute a waiver of the doctor-patient privilege, except as otherwise provided in the rules pertaining to the Arkansas Judges and Lawyers Assistance Program.

H. A respondent in a disciplinary proceeding who raises the defense or issue of mental or physical disability or incapacity shall be deemed to have consented to undergoing an independent medical examination by a physician or physicians selected by the Committee or the Executive Director, at the expense of the Committee or the Office of Professional Conduct, and the results of any such examination shall be admissible in any disciplinary proceeding under such conditions as the panel chair may establish.

(2) *Immunity for Disciplinary Proceedings.* Except for perjury and false swearing, complainants, respondents, and witnesses are absolutely immune from suit or action for all communications with the Office of Professional Conduct and the Committee and for all statements made within the disciplinary proceeding. (Effective May 26, 2011)

SECTION 12. APPEAL.

A. A respondent attorney or the Executive Director aggrieved by an action of a panel taken at a public hearing may appeal to the Arkansas Supreme Court by filing a Notice of Appeal with the Office of Professional Conduct within thirty (30) calendar days after the filing of the panel's final written order with the Clerk or by filing a Notice of Cross-Appeal with the Office of Professional Conduct within ten (10) calendar days after receiving a properly-filed notice of appeal. The appeal shall proceed as an action between the Executive Director and the respondent. The panel may stay the effective date of any order or action, pending appeal to the Arkansas Supreme Court. There shall be no appeal by the respondent attorney of a panel's decision to file an action for disbarment pursuant to Section 13.

B. Appeals from any action by a panel after hearing shall be heard *de novo* on the record made before the Committee panel, and the Arkansas Supreme Court shall pronounce such judgment as, in its opinion, should have been pronounced below.

C. Notice of appeal and lodging of the record on appeal shall be in accordance with the Rules of Appellate Procedure — Civil and the Rules of the Arkansas Supreme Court governing appeals in civil matters. If no

appeal is perfected within the time allowed and in the manner provided, the action of the panel shall be final and binding on all parties. (Effective May 26, 2011)

SECTION 13. DISBARMENT PROCEEDINGS.

A. An action for disbarment shall be filed as an original action with the Clerk of the Supreme Court. Upon such filing, the Arkansas Supreme Court, pursuant to Amendment 28 of the Arkansas Constitution, shall assign a special judge to preside over the disbarment proceedings. The special judge, the Executive Director, or the Clerk shall arrange for a courtroom or other suitable facility in Pulaski County in which the proceedings shall be heard. The special judge may hear preliminary and post-trial matters and take other such actions outside of Pulaski County to the same extent that the law permits judges sitting by assignment or on exchange to do so. With the consent of all the parties, the judge may conduct the proceedings outside of Pulaski County. All allegations of violation(s) of the Rules by the attorney, notwithstanding the situs of the alleged conduct, shall be heard in this proceeding. In disbarment suits, the action shall proceed as an action between the Executive Director and the respondent. Proceedings shall be held in compliance with the Arkansas Rules of Civil Procedure and the Arkansas Rules of Evidence, and trial shall be had without a jury. A disbarment proceeding may be tried on the original petition for disbarment, any amended petitions for disbarment, and such other allegations and charges as to which the respondent has been given adequate notice and opportunity to defend. After a Committee panel votes to initiate disbarment, it shall not be required that any additional charges or allegations in the disbarment proceeding be considered and voted on by a Committee panel.

B. The judge shall first hear all evidence relevant to the alleged misconduct and shall then make and file with the Clerk a written determination as to whether the allegations have been proven. Upon a finding of misconduct, the judge shall then hear all evidence relevant to an appropriate sanction to be imposed, including evidence related to the factors listed in Section 19 and the aggravating and mitigating factors set out in the American Bar Association's Model Standards for Imposing Lawyer Sanctions, §§ 9.22 and 9.32 (1992). See *Wilson v. Neal*, 332 Ark. 148, 964 S.W.2d 199 (1998).

C. The judge shall make findings of fact and conclusions of law with respect to the alleged misconduct of the respondent attorney and the imposition of sanctions, including the factors discussed in Section 13(B). Before filing the findings and conclusions, the judge may solicit proposed findings of fact and conclusions of law from the parties and may submit a draft thereof to the parties or counsel for all parties for

the purpose of receiving their objections and suggestions. The judge shall make a recommendation as to the appropriate sanction from those set out in Section 17(D).

D. The findings of fact, conclusions of law, and recommendation of an appropriate sanction shall be filed with the Clerk of the Supreme Court along with a transcript and the record of the proceedings, which shall include all pleadings, orders, and other appropriate materials filed with the Clerk of the Supreme Court. Upon the filing, the parties shall file briefs as in other cases. If any sanction is recommended by the special judge, the respondent attorney shall brief first, as the appellant. The findings of fact filed by the special judge shall be accepted by the Supreme Court unless clearly erroneous. The Supreme Court shall impose the appropriate sanction, if any, as the evidence may warrant. In imposing the sanction of suspension of law license, the attorney may be suspended for a period not exceeding five (5) years. There is no appeal from the decision of the Supreme Court, except as may be available under federal law. (Effective May 26, 2011)

SECTION 14. RECIPROCAL DISBARMENT, SUSPENSION, OR DISABILITY INACTIVE STATUS.

A. *Executive Director's Duty to Obtain Order of Disbarment, Suspension, or Transfer to Disability Inactive Status.* Within fifteen (15) days after any person admitted to practice in Arkansas is disbarred, suspended, or transferred to disability inactive status by a state or federal court or a corresponding disciplinary authority of another jurisdiction, the attorney shall inform the Executive Director of the disbarment, suspension, or transfer. Upon notification from any source that an attorney licensed to practice in Arkansas has been disbarred, suspended, or transferred to disability inactive status by another state or federal court or a corresponding disciplinary authority of another jurisdiction, the Executive Director shall obtain a certified copy of the order imposing such discipline and file it with the Committee on Professional Conduct.

B. *Notice Served upon Respondent.* Upon receipt of a certified copy of an order imposing a disbarment, suspension, or transfer, the Executive Director shall serve on the attorney, as provided in Section 9, a copy of the order and notice that the attorney has twenty (20) days from the day of service to file with the Executive Director any claim by the attorney predicated upon the grounds set forth in Paragraph F, that the imposition of the identical sanction would be unwarranted and the reasons for that claim.

C. *Effect of Stay in Other Jurisdiction.* In the event the disbarment, suspension, or transfer to disability inactive status imposed in the other jurisdiction has been stayed there, any reciprocal sanction imposed in this jurisdiction shall be deferred until the stay expires.

D. *No Claim Filed.* If no claim is filed within twenty (20) days, the Executive Director shall so inform the Committee, which shall proceed to determine the matter by ballot vote consistent with the requirements of Section 10 of these Procedures, to the extent applicable.

E. *Claim Filed.* If a claim is filed within twenty (20) days, the Executive Director may file and serve a response to the claim within fifteen (15) days after the claim is filed. Within fifteen (15) days after service of any such response, the attorney who filed the claim may file a reply. The claim shall be determined by ballot vote consistent with the requirements of Section 10 of these Procedures, to the extent applicable.

F. *Discipline to Be Imposed.* Upon a ballot vote, a Panel of the Committee shall impose the identical disbarment, suspension, or transfer to disability inactive status, unless the panel finds that:

(1) The procedure before the other state or federal court or corresponding disciplinary authority was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(2) There was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Committee could not, consistent with its duty, accept as final the conclusion on that subject; or

(3) The disbarment, suspension, or transfer imposed would result in grave injustice or be offensive to the public policy of Arkansas; or

(4) The reason for the original transfer to disability inactive status no longer exists.

If the Committee determines that any of those elements exists, the Committee shall enter such other order as it deems appropriate. The burden is on the party seeking different discipline in this jurisdiction to demonstrate that the imposition of the same discipline is not appropriate.

G. *Conclusiveness of Adjudication Before Another State or Federal Court or Corresponding Disciplinary Authority.* In all other respects, a final adjudication before another state or federal court or corresponding disciplinary authority determining that a lawyer is guilty of misconduct or should be transferred to disability inactive status shall establish conclusively the misconduct or the disability for purposes of a disciplinary or disability proceeding in this jurisdiction.

H. *Appeal.* A respondent attorney or the Executive Director aggrieved by the action of a Committee Panel on a reciprocal discipline or disability matter may appeal to the Arkansas Supreme Court under the provisions of Section 12 (Appeal) of these Procedures. Neither the attorney nor the Executive Director may request or obtain a public hearing before another Committee Panel on a reciprocal disbarment, suspension, or transfer to disability inactive status. (Effective May 26, 2011)

SECTION 15. CRIMINAL ACTIVITY.

A. *Reporting Determinations of Guilt.* All prosecuting attorneys and judges participating in or presiding over a proceeding in which an attorney pleaded guilty to, entered a nolo contendere plea to, or has been found guilty of a Serious Crime in any jurisdiction shall have the duty to report such conviction or plea to the Executive Director.

B. *Notification of Possible Criminal Activity.* When, in connection with an investigation or a hearing, either the Office of Professional Conduct or the Committee is presented with any substantial evidence of criminal conduct by any party which would constitute a Serious Crime in any jurisdiction, the Office of Professional Conduct, on its own initiative or at the direction of the Committee, shall notify the appropriate state or federal prosecutorial authority.

C. *Procedures for Disbarment.*

(1) When a complaint against an attorney is based on a conviction in any jurisdiction of, or a plea of guilty or *nolo contendere* in any jurisdiction to, a Serious Crime, or a crime which also violates Rule 8.4 (b) of the Rules, the Committee shall institute disbarment proceedings.

(2) Actions for disbarment based on the conviction of a crime or on a plea of guilty or *nolo contendere* shall proceed in accordance with the procedures in Section 13 of these Procedures.

(3) A certified copy of the judgment of conviction or of evidence of a plea of guilty or *nolo contendere* shall be conclusive evidence of the attorney's guilt.

(4) The attorney may not offer evidence inconsistent with the essential elements of the crime for which he or she was convicted. (Effective May 26, 2011)

SECTION 16. INTERIM SUSPENSION PROCEDURE.

A. An action for the interim suspension of a lawyer is initiated, adjudicated, and imposed in the following manner:

(1) Pursuant to Section 17(E)(3)(a), an interim suspension may be imposed immediately upon a panel's decision to institute disbarment action on any formal complaint pending before it;

(2) Pursuant to Section 17(E)(3)(b), an interim suspension may be imposed upon presentation to a panel of the Committee of satisfactory proof that the attorney has pleaded guilty to, entered a *nolo contendere* plea to, or been found guilty of a Serious Crime in any jurisdiction;

(3) Pursuant to Section 17(E)(3)(c), a panel of the Committee may impose an interim suspension upon presentation of a verified petition by the Executive Director containing sufficient evidence to demonstrate that the attorney poses a substantial threat of serious harm to the public or to the lawyer's clients.

B. The attorney shall be given immediate notice of interim suspension, consistent with the provisions of Section 9(A). Within fifteen (15) calendar days of notice of the imposition of interim suspension, the attorney may submit to the Executive Director an original and eight (8) copies of an affidavit in rebuttal of the evidence before the panel of the Committee and a request for the dissolution or modification of the interim suspension. Within ten (10) calendar days after the submission of any such affidavit and request, the Office of Professional Conduct may file a response. The affidavit, the request, and any response shall be disseminated by mail, e-mail, or facsimile transmission to the panel of the Committee forthwith for its reconsideration and expeditious action. Upon receipt of the panel's decision and order, the Executive Director shall promptly notify the attorney pursuant to Section 9(A)(2).

C. An attorney suspended pursuant to Section 17(E)(3) shall comply with the requirements of Section 21. The imposition of an interim suspension does not abate any pending disciplinary actions against the attorney.

D. An interim suspension imposed pursuant to Section 17(E)(3)(c) shall be dissolved upon the following conditions:

(1) The alleged misconduct did not result in a decision to initiate disbarment or in action by a panel of the Committee pursuant to Sections 9(A)(1), 9(B), and 10(E)(3); and

(2) Ninety (90) days have elapsed from the denial of a request to dissolve or modify the suspension, unless a disbarment proceeding is being pursued; and,

(3) The attorney complied with the requirements of Section 21.

E. Upon the filing of a petition for a writ of certiorari with the Clerk after final action by the Committee or its panel imposing an interim suspension on an attorney, the Arkansas Supreme Court, in its discretion, may decide whether to review the imposition of the interim suspension and may take any action regarding the interim suspension which it determines is appropriate. (Effective May 26, 2011)

SECTION 17. SANCTIONS.

A. *Grounds for Discipline.* It shall be grounds for discipline for a lawyer to:

(1) Violate or attempt to violate the Rules or any other rules of Arkansas regarding professional conduct of lawyers; or

(2) Engage in conduct violating applicable rules of professional conduct of another jurisdiction in which the attorney is licensed or practices.

B. *Serious Misconduct.* Serious misconduct is conduct in violation of the Rules that would warrant a sanction terminating or restricting the lawyer's license to practice law. Conduct will be considered serious misconduct if any of the following considerations apply:

(1) The misconduct involves the misappropriation of funds;

(2) The misconduct results in, or is likely to result in, substantial prejudice to a client or other person;

(3) The misconduct involves dishonesty, deceit, fraud, or misrepresentation by the attorney;

(4) The misconduct is part of a pattern of similar misconduct;

(5) The attorney's prior record of public sanctions demonstrates a substantial disregard of the attorney's professional duties and responsibilities; or

(6) The misconduct constitutes a "Serious Crime," as defined in these Procedures.

C. *Lesser Misconduct.* Lesser misconduct is conduct in violation of the Rules that would not warrant a sanction terminating or restricting the lawyer's license to practice law.

D. *Types of Sanctions.* Misconduct shall be grounds for one or more of the following sanctions:

(1) DISBARMENT: The termination of the attorney's privilege to practice law and removal of the attorney's name from the list of licensed attorneys.

(2) SUSPENSION: A limitation for a fixed period of time on the attorney's privilege to engage in the practice of law.

(3) INTERIM SUSPENSION: A temporary suspension for an indeterminate period of time of the attorney's privilege to engage in the practice of law pending the final adjudication of a disciplinary matter.

(4) REPRIMAND: A severe public censure issued against the attorney.

(5) CAUTION: A public warning issued against the attorney.

(6) WARNING: A non-public caution issued against the attorney.

(7) PROBATION: Written conditions imposed for a fixed period of time, and with the attorney's consent, permitting the attorney to engage in the practice of law under the supervision of another attorney.

E. *Imposition of Sanctions.* When a panel of the Committee finds that an attorney has violated any provision of the Rules, the panel is authorized:

(1) To cause a complaint for disbarment to be prepared and filed against the lawyer in accordance with Section 13. Disbarment proceedings are appropriate when mandated by Section 15(C) of the Procedures or upon a finding of "serious misconduct" for which a lesser sanction would be inappropriate. A finding that a lawyer has committed acts against a client which constitute theft of property under Ark. Code Ann. § 5-36-103 (or its replacement), regardless of whether the attorney has been criminally charged or convicted, shall result in the automatic filing of disbarment proceedings. Actions for disbarment address the overall fitness of a lawyer to hold a license to practice law. The

Committee's written notice to institute a disbarment proceeding need not state specific findings as to the misconduct or Rule violations.

(2) To suspend the lawyer's privilege to practice law for a fixed period of time not less than thirty (30) days and not in excess of five (5) years. Suspension is appropriate when a panel of the Committee finds that the lawyer has engaged in "serious misconduct," and, consonant with the pertinent factors listed in Section 19, the nature and degree of such misconduct do not warrant disbarment.

(3) To temporarily suspend the lawyer's privilege to practice law pending final adjudication and disposition of a disciplinary matter. Interim suspension shall be appropriate in the following situations:

(a) Immediately on decision to initiate disbarment;

(b) Immediately upon proof that the attorney has been found guilty of a Serious Crime in any jurisdiction, notwithstanding pending post-conviction actions; and,

(c) When a panel of the Committee is in receipt of sufficient evidence demonstrating that the lawyer has engaged or is engaging in misconduct involving:

(i) Misappropriation of funds or property;

(ii) Abandonment of the practice of law; or,

(iii) Substantial threat of serious harm to the public or to the lawyer's clients.

(4) To issue the lawyer a letter of reprimand. A reprimand is appropriate when a panel of the Committee finds that a lawyer has engaged in "lesser misconduct" that, by application of the factors listed in Section 19, warrants a sanction more severe than a caution. Additionally, in certain very limited circumstances, a panel of the Committee may find that a reprimand is appropriate for conduct otherwise falling within the definition of "serious misconduct" when application of the aforementioned factors substantially demonstrates clear and compelling grounds for sanctions less severe than restriction of the privilege to practice law.

(5) To issue the lawyer a letter of caution. A caution is appropriate when a panel of the Committee finds that a lawyer has engaged in "lesser misconduct" and application of the aforementioned factors does not warrant a reprimand.

(6) To issue a letter of warning. Prior to the preparation of an affidavit of complaint, or subsequent to a lawyer's affidavit of response but before a panel of the Committee has issued a formal letter of disposition in a pending matter, the Executive Director, with the written consent of the attorney and with the approval of the chair of a panel, is authorized to issue a non-public letter of warning to the lawyer. Only in cases of "lesser misconduct" of a minor nature, when there is little or no injury to a client, the public, the legal system, or the

profession, and when there is little likelihood of repetition by the lawyer, should a warning be imposed. A warning is not a sanction available to a panel of the Committee when issuing a formal order of disposition following public adjudication of the disciplinary matter.

(7) To impose probationary conditions. Before or after the filing of a formal complaint, a panel of the Committee may, with the written consent of the lawyer, place the lawyer on probation for a period not exceeding two (2) years. Probation shall be used only in cases where there is little likelihood that the lawyer will harm the public during the period of rehabilitation and the conditions of probation can be adequately supervised. Probation may be utilized concurrently with imposition of other sanctions not restricting the privilege to practice law or may follow a period of suspension. The probationary conditions shall be in writing and acknowledged, in writing, by the lawyer. A lawyer amenable to probation shall be responsible for obtaining the agreement of another lawyer, acceptable to a panel of the Committee, to supervise, monitor, and assist the lawyer as required to fulfill the conditions of probation, or for obtaining a Monitoring Contract with the Arkansas Judges and Lawyers Assistance Program, acceptable to a panel of the Committee, to accomplish the same things. Assent to undertake supervision shall be acknowledged in writing to a panel of the Committee. Probation shall be terminated upon the filing of an affidavit by the lawyer showing compliance with the conditions and an affidavit by the supervising lawyer or an authorized representative of the Arkansas Judges and Lawyers Assistance Program stating probation is no longer necessary and summarizing the basis for that statement. Willful or unjustified non-compliance with the conditions of probation will terminate the probation and subject the lawyer to further disciplinary action, to include imposition of a more severe sanction which could have been imposed originally but for the agreement to probation. An attorney subjected to such further disciplinary action may only offer evidence or argument relating to the willful or unjustified nature of the non-compliance. Unsuccessful rehabilitation or non-completion of the probation conditions will subject the lawyer to further disciplinary proceedings consistent with these Procedures. Except as necessary to the Committee's discharge of its responsibilities, terms and conditions of probation and reports related thereto which involve the lawyer's mental, physical, or psychological condition shall be confidential. (Effective May 26, 2011)

SECTION 18. FINES, COSTS, AND RESTITUTION.

In addition to the Committee's authority set forth in Section 17 of these Procedures, a panel of the Committee, in any case where a disciplinary sanction, including a consent warning, is imposed, may:

A. Assess the respondent attorney the costs of the proceedings, including the costs of investigations, witness fees, service of process, depositions, independent medical examinations, and a court reporter's services;

B. Impose a fine of not more than $25,000.00; and

C. Order restitution to persons financially injured by the conduct. (Effective May 26, 2011)

SECTION 19. FACTORS TO BE CONSIDERED IN IMPOSING SANCTIONS.

A. *General Factors.* In addition to any other considerations permitted by these Procedures, a panel of the Committee and any judge, in imposing or recommending any sanctions, may consider:

(1) The nature and degree of the misconduct for which the lawyer is being sanctioned.

(2) The seriousness and circumstances surrounding the misconduct.

(3) The loss or damage to clients.

(4) The damage to the profession.

(5) The assurance that those who seek legal services in the future will be protected from the type of misconduct found.

(6) The profit to the lawyer.

(7) The avoidance of repetition.

(8) Whether the misconduct was deliberate, intentional, or negligent.

(9) The deterrent effect on others.

(10) The maintenance of respect for the legal profession.

(11) The conduct of the lawyer during the course of the Committee action.

(12) The lawyer's prior disciplinary record, to include warnings.

(13) Matters offered by the lawyer in mitigation or extenuation, except that a claim of disability or impairment resulting from the use of alcohol or drugs may not be considered unless the lawyer demonstrates that he or she is successfully pursuing in good faith a program of recovery.

B. *Aggravating Factors.* Any panel or judge may also consider the following aggravating factors identified by the American Bar Association Joint Committee on Professional Standards and recognized by the Arkansas Supreme Court in *Wilson v. Neal*, 332 Ark. 148, 964 S.W.2d 199 (1998):

(1) prior disciplinary offenses;

(2) dishonest or selfish motive;

(3) a pattern of misconduct;

(4) multiple offenses;

(5) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with these Procedures or orders of the Committee;

(6) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

(7) refusal to acknowledge the wrongful nature of the conduct;

(8) vulnerability of the victim;

(9) substantial experience in the practice of law;

(10) indifference to making restitution; and

(11) illegal conduct, including that involving the use of controlled substances.

C. *Mitigating Factors.* Any panel or judge may also consider the following mitigating factors identified by the American Bar Association Joint Committee on Professional Standards and recognized by the Arkansas Supreme Court in *Wilson v. Neal*, 332 Ark. 148, 964 S.W.2d 199 (1998):

(1) absence of a prior disciplinary record;

(2) absence of a dishonest or selfish motive;

(3) personal or emotional problems;

(4) timely good faith effort to make restitution or to rectify the consequences of the misconduct;

(5) full and free disclosure to the disciplinary board or cooperative attitude towards the proceedings;

(6) inexperience in the practice of law;

(7) character or reputation;

(8) physical disability;

(9) mental disability or chemical dependency including alcoholism or drug abuse when:

(a) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;

(b) the chemical dependency or mental disability caused the misconduct;

(c) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and

(d) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.

(10) delay in [the] disciplinary proceedings;

(11) impositions of other penalties or sanctions;

(12) remorse;

(13) remoteness of prior offenses. (Effective May 26, 2011)

SECTION 20. SURRENDER OF LICENSE/DISCIPLINE BY CONSENT.

A. *Surrender of License.* An attorney may surrender his or her license upon the conditions agreed to by the attorney, the Executive Director, and a panel of the Committee. An attorney may offer or

consent to the voluntary surrender of his or her license at any stage of the proceedings. No petition to the Supreme Court for voluntary surrender of license by an attorney shall be granted until it is referred to a panel of the Committee and the recommendations of the panel are received by the Supreme Court. (See Section 20(E)(2), for the procedure where there is a disciplinary proceeding pending, if Supreme Court does not accept the voluntary offer of surrender.)

B. *Discipline by Consent.*

(1) An attorney against whom a formal complaint has been served may, (a) not less than twenty (20) calendar days before the panel meeting at which the complaint will be on the panel agenda for ballot vote action or (b) not less than twenty (20) calendar days before the commencement of a public hearing before a panel of the Committee, tender a conditional acknowledgment and admission of violation of any of the Rules alleged in the formal complaint, or to particular provisions of Rules so alleged, in exchange for a stated disciplinary sanction in accordance with the following:

(2) With service of a formal complaint, the respondent attorney will be advised that, if a negotiated disposition by consent is contemplated, the respondent attorney should contact the Executive Director to undertake good faith discussion of a proposed disposition. All discipline by consent proposals must be approved in writing by the Executive Director, before they can be submitted to a panel.

(3) Upon a proposed disposition acceptable to the respondent attorney and the Executive Director, the respondent shall execute and submit a discipline by consent on a document prepared by the Executive Director setting out the necessary factual circumstances, admission of violation of the Rules, and the proposed sanction.

(4) The consent proposal, along with copies of the formal complaint, and the recommendations of the Executive Director, shall be presented to a panel of the Committee for their votes by written ballot to accept or reject the proposed disposition. The respondent will be notified immediately in writing of the panel decision. Rejection will result in the continuation of the formal complaint process, using a different panel, by a ballot vote pursuant to Section 10 or a public hearing pursuant to Section 11, as the case may be.

C. No appeal may be taken from a disciplinary sanction entered by consent.

D. The panel shall file written evidence of the terms of the discipline by consent with the Clerk, unless the discipline by consent is a non-public warning.

E. *Serious Misconduct.* If the discipline by consent involves allegations of Serious Misconduct and a suspension of the respondent attorney's license, it shall be presented to the Supreme Court for approval or disapproval.

(1) The Executive Director shall present to the Supreme Court, under such procedures as the Supreme Court may direct, any discipline by consent proposal which the Executive Director has reached with a respondent attorney and which involves allegations of Serious Misconduct and a suspension of license.

(2) If the Supreme Court does not approve of the proposed discipline by consent or the voluntary surrender of license, the matter shall be referred to a panel that has not rendered a decision in the case by ballot vote. The new panel shall resume, as practical, the proceedings at the stage at which they were suspended when the proposal was made and submitted to the Supreme Court. If both regular panels have been used in prior proceedings involving a case, the case shall go to Panel C and then, if necessary, to Panel D for consideration.

(3) The fact that an offer and proposed sanction was agreed to by the Executive Director, the terms of the proposed discipline by consent, and the fact that the Supreme Court rejected the proposal shall not be disclosed to the new panel, except in those instances where disclosure of compromises is permitted under Rule 408 of the Arkansas Rules of Evidence. (Effective May 26, 2011)

SECTION 21. DUTIES OF SANCTIONED ATTORNEY.

In every case in which an attorney is disbarred, suspended, or surrenders the attorney's law license, the attorney shall, within twenty (20) days of the filing of the final order of disbarment, suspension, or surrender:

A. Notify all of the attorney's clients and any counsel of record in pending matters in writing that the attorney has been disbarred or suspended or has surrendered his or her Arkansas law license;

B. In the absence of co-counsel, notify all clients in writing to make arrangements for other representation, calling attention to any urgency in seeking the substitution of another attorney;

C. Deliver to all clients being represented in pending matters any papers or property to which they are entitled, or notify them or co-counsel of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers and other property;

D. Refund any part of the fees or costs paid in advance that have not been earned or expended;

E. File with the Court, agency, or tribunal before which any litigation is pending a copy of the notice to the opposing counsel, or adverse parties if no opposing counsel;

F. Keep and maintain a record for each client of the steps taken to accomplish the foregoing;

G. File with the Clerk and the Office of Professional Conduct a list of all other state, federal, and administrative jurisdictions to which the

attorney is licensed or admitted to practice. Upon such filing, the Clerk shall notify those jurisdictions entitled to notice of the disbarment, suspension, or surrender.

H. The attorney shall, within thirty (30) days of disbarment, suspension, or surrender of license, file an affidavit with the Committee that the attorney has fully complied with the provisions of the order and completely performed the foregoing or provide a full explanation of the reasons for the attorney's noncompliance. Such affidavit shall also set forth the address where communications may thereafter be directed to the respondent. The affidavit shall also include an exemplar copy of each type of notice letter sent to clients, courts, co-counsel, or other or opposing counsel of record. The affidavit shall also include a list of the attorney's clients, with a current mailing address and telephone number(s) for each, for use by the Committee to verify that each client has received actual notice of the attorney's change of status and that the attorney has timely complied with all other obligations imposed by these Procedures.

I. Failure to comply with these Procedures shall subject the attorney to punishment for contempt of the Arkansas Supreme Court. (Effective May 26, 2011)

SECTION 22. RESTRICTIONS ON FORMER ATTORNEYS.

A. For the purposes of this Section, a "former attorney" is any attorney who is disbarred, has surrendered a law license, is on suspension pursuant to these Procedures, or is on inactive status.

B. A former attorney shall not occupy, share, or use office space in any office where the practice of law is conducted.

C. A former attorney shall not engage in the practice of law, nor may a former attorney engage in any employment in, or related to, the practice of law, except as specifically permitted in this Section

D. For legal service provided to a client that was not completed prior to becoming a former attorney, a former attorney may receive compensation only on a *quantum meruit* basis.

E. A former attorney shall promptly take such action as is necessary to cause the removal of any indicia of lawyer, counselor at law, attorney, legal assistant, law clerk, or similar title from any association with the name of the former attorney.

F. Consistent with the restrictions in this Section 22, a former attorney may provide to attorneys and law firms, whether for or without compensation, services involving legal research and drafting of briefs and research memoranda.

G. A former attorney shall have no contact with clients or prospective clients of any attorney or law firm in person, by telephone, in writing, by e-mail, or by any other form of communication, written, electronic, or in person.

H. A former attorney shall have no contact with client funds or property.

I. Any former attorney providing permitted services may be compensated only for the reasonable value of the services provided and shall not be compensated on a contingency basis or share in any way in any fees for legal services provided by an attorney.

J. A former attorney shall not provide services permitted by this Section to any attorney or law firm with whom the former attorney had any employment, partnership, equity, office-sharing, expense-sharing, or "of counsel" affiliation as an attorney at the time of the activities which resulted in the attorney's becoming a former attorney or at the time of the final action which resulted in the attorney's becoming a former attorney.

K. Any attorney or law firm utilizing the services of a former attorney as permitted in this Section 22 shall be responsible for the actions and work product of the former attorney in the rendering of such services and to ensure that the restrictions on a former attorney set out in this Section 22 are observed.

L. An attorney shall not aid a former attorney in the unauthorized practice of law or in a violation of the restrictions set out in this Section 22 on former attorneys. An attorney shall have an obligation, as under Rule 8.3, to report any violation of this Section 22 by a former attorney.

M. No attorney, firm, professional corporation, or other business entity shall practice law or provide legal services under any name that includes the name of any former attorney, while that attorney is a former attorney, except to the extent that it is entitled to do so independently of any prior or present relationship with the former attorney. This prohibition applies, without limitation, to any name used on any letterhead, written communication, signage, advertising, e-ail, website, or similar means of placing a firm's name before the public, the courts, or other attorneys.

N. The maximum punishment for violation of this Section 22 by an attorney, or any former attorney on suspension or on inactive status, may be disbarment. A former attorney previously disbarred or who has surrendered a law license and who violates this Section 22 may be deemed to be in contempt of the Supreme Court and may be punished accordingly. (Effective May 26, 2011)

SECTION 23. REINSTATEMENT.

A. Following any period of suspension from the practice of law, an attorney desiring reinstatement shall file with the Executive Director a verified petition requesting reinstatement.

B. The petition for reinstatement shall be accompanied by proof of payment of an application fee of $100.00 to the Clerk.

C. The petition for reinstatement shall state that:

(1) The attorney has fully and promptly complied with the requirements of Section 21;

(2) The attorney has refrained from practicing law during the period of suspension;

(3) The attorney's license fee is current or has been tendered to the Clerk; and

(4) The attorney has fully complied with any requirements imposed by the Committee as conditions for reinstatement.

D. Any knowing misstatement of fact may constitute contempt of the Supreme Court and grounds for denial or revocation of reinstatement.

E. Failure to comply with the provisions of Section 21(G) and (H) shall preclude consideration for reinstatement.

F. Within ten (10) calendar days after the filing of the petition for reinstatement, the Office of Professional Conduct may file a response.

G. Within ten (10) calendar days after service of the response, the petitioning attorney may file a reply.

H. The Office of Professional Conduct shall promptly submit the petition, any response, and any reply to a panel of the Committee for ballot vote.

I. No attorney shall be reinstated to the practice of law in this State until the Arkansas Supreme Court has received an affirmative vote by a majority of a panel of the Committee. (Effective May 26, 2011)

SECTION 24. READMISSION TO THE BAR.

A. No attorney who has been disbarred or who has surrendered his or her law license in this State shall thereafter be readmitted to the Bar of Arkansas except upon application made to the State Board of Law Examiners in accordance with the Rules Governing Admission To The Bar, or any successor rules, and the approval of the Arkansas Supreme Court.

B. Provided, however, that application for readmission to the Bar of Arkansas shall not be allowed in any of the following circumstances:

(1) A period of less than five (5) years has elapsed since the effective date of the order of disbarment or surrender;

(2) The disbarment or surrender resulted from conviction of a Serious Crime in any jurisdiction, unless the Serious Crime was an offense for which the culpable mental state was that of negligence or recklessness; or

(3) Any of the grounds found to be the basis of a disbarment or any grounds presented in a voluntary surrender of law license are of the character and nature of conduct that reflects adversely on the individual's honesty or trustworthiness, whether or not the conviction of any criminal offense occurred. (Effective May 26, 2011)

SECTION 25. INACTIVE STATUS.

A. *Temporary Transfer to Inactive Status.* The Committee is authorized to temporarily transfer an attorney to inactive status in the event that:

(1) The attorney has been judicially declared incompetent; or

(2) The attorney has been involuntarily committed due to incapacity or disability; or

(3) The attorney has alleged incapacity during the course of a disciplinary proceeding against him or her; or

(4) The attorney is found by the Committee to be culpable of habitual drunkenness or drug use substantially affecting the attorney's fitness to practice law; or

(5) The attorney is found by the Committee to have appeared in Court while under the influence of alcohol or drugs; or

(6) The attorney is found by the Committee to be unfit to practice law due to mental infirmity whether or not he or she has been judicially declared incompetent; or

(7) Without cause, the attorney requests to be transferred to a voluntary inactive status.

B. All judges have the duty to, and shall report to the Committee any attorney appearing before them who, in the judge's opinion, is under the influence of alcohol or drugs.

C. The Committee may vote by ballot as provided in Section 10 of these Procedures, on the issue of temporary transfer to inactive status or reinstatement due to an event described in subsections A (1), (2), (3) or (7) of this Section.

D. All other temporary transfers of an attorney to inactive status shall be made only after hearings initiated by the Executive Director or others and conducted in the same manner, where applicable, as provided in Section 11 of these Procedures. Provided further, however, the Committee may in its sound discretion hold a closed hearing and seal the record thereof.

E. For good cause shown, the Committee may order the attorney to submit to a medical, psychiatric, or psychological examination by a Committee-appointed expert.

F. No attorney shall be entitled to practice in Arkansas while on inactive status in this State. Upon a transfer to inactive status the attorney, or his or her counsel as may be appropriate, shall comply with Section 21 of these Procedures.

G. The Committee may reinstate an attorney to active status upon a showing that any disability has been removed and the attorney is fit to resume the practice of law.

H. Reinstatement shall be accomplished in accordance with the provisions of Section 23.

I. The filing of a petition for reinstatement shall be deemed a waiver of the doctor-patient privilege regarding the disability. (Effective May 26, 2011)

SECTION 26. EXPUNGEMENT OF DISMISSALS.

After three years, the Committee shall expunge all records or other evidence of the existence of complaints terminated by dismissals or referrals to alternative programs pursuant to Section 5(C)(2), except that, upon the Executive Director's application, notice to respondent, and a showing of good cause, the Committee may permit the Executive Director to retain such records for one additional period of time not to exceed three years.

A. *Notice to Respondent.* If the respondent was contacted by the Executive Director or Committee concerning the complaint, or the Executive Director or Committee otherwise knows that the respondent is aware of the existence of the complaint, the respondent shall be given prompt written notice of the expungement.

B. *Effect of Expungement.* After a file has been expunged, any response by the Executive Director or Committee to an inquiry requiring a reference to the matter shall state that there is no record of such matter. The respondent may answer any inquiry requiring a reference to an expunged matter by stating that no complaint was made. (Effective May 26, 2011)

SECTION 27. CONTEMPT.

The following shall be regarded as contempt of the Arkansas Supreme Court:

A. Willful disobedience of any Committee or panel order, summons, or subpoena;

B. The refusal to testify on matters not privileged by law;

C. Knowingly testifying falsely before a panel of the Committee;

D. Engaging in the practice of law during a period of suspension;

E. Engaging in the practice of law after a disbarment or surrender of license; or,

F. Violation of these Procedures by any person. (Effective May 26, 2011)

SECTION 28. ATTORNEY TRUST ACCOUNT AND AUTOMATIC "OVERDRAFT" NOTIFICATION PROCEDURE.

A. *Consent By Lawyers.* Every lawyer practicing or admitted to practice in Arkansas shall, as a condition thereof, be conclusively deemed to have consented to the trust account overdraft reporting and production requirements mandated by this Section.

B. *Overdraft Notification Agreement Required.* A financial institution shall be approved as a depository for lawyer trust accounts only if it files

with the Arkansas Supreme Court Office of Professional Conduct (the "Office") an agreement, in a form provided by the Office, to report to that Office whenever any properly payable instrument is presented against any lawyer trust account containing insufficient funds, irrespective of whether or not the instrument is honored. The Office may establish additional procedures, to be approved by the Supreme Court, governing approval and revocation of approved status for financial institutions. The Office shall annually file with the Supreme Court Clerk and the Arkansas IOLTA Foundation, and post on the Court's website, not later than January 1, a current list of approved financial institutions. No attorney or law firm trust account shall be maintained in any financial institution that does not agree to so report and is not approved by the Office. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon thirty (30) days written notice to the Office.

C. *Overdraft Reports.* The overdraft notification agreement shall provide that all reports made by the financial institution to the Office shall be in the following format:

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors;

(2) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of overdraft created thereby.

D. *Timing of Reports.* Reports under subsection 28(C) shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five (5) banking days of the date of presentation for payment against insufficient funds.

E. *Costs.* Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this Section.

F. *Trust Accounts.* Lawyers who practice law in Arkansas shall deposit all funds held in trust in Arkansas in accordance with Rule 1.15(a) of the Arkansas Rules of Professional Conduct in accounts clearly identified as "trust" or "escrow" accounts, referred to herein as "trust accounts," and shall take all steps necessary to inform the depository institution of the purpose and identity of the accounts. Funds held in trust include funds held in any fiduciary capacity in connection with a representation, whether as trustee, agent, guardian, executor, or otherwise. Lawyer trust accounts shall be maintained only in financial institutions approved by the Office.

G. *Account Records.* Every lawyer engaged in the practice of law in Arkansas shall maintain and preserve for a period of at least five years, after final disposition of the underlying matter, the records of the accounts, including checkbooks, canceled checks, check stubs, vouchers, ledgers, journals, closing statements, accountings, or other statements of disbursements rendered to clients or other parties with regard to trust funds or similar equivalent records clearly and expressly reflecting the date, amount, source, and explanation for all receipts, withdrawals, deliveries, and disbursements of the funds or other property of a client.

H. *Definitions.* For purposes of this Section:

(1) "Financial institution" includes a bank, savings and loan association, credit union, savings bank, and any other business or person that accepts for deposit funds held in trust by lawyers.

(2) "Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of Arkansas.

(3) "Notice of dishonor" refers to the notice that a financial institution is required to give, under Arkansas law, upon presentation of an instrument, that the institution dishonors.

(4) "Office" means the Office of Professional Conduct of the Arkansas Supreme Court.

I. *Form of Overdraft Reporting Agreement.* The form of the "Attorney Trust Account Overdraft Reporting Agreement" attached hereto, and as may be subsequently revised, is approved for use.

J. *Disapproval or Revocation of Approval of Financial Institutions.*

(1) Refusal of the Office to approve a financial institution due to failure of the financial institution to timely submit an initial properly executed written agreement on the form approved by the Court or the Office is not appealable or otherwise subject to challenge, including by civil action in any court.

(2) Approval of a financial institution shall be revoked and the financial institution removed from the list of approved financial institutions if it is found by the Executive Director to have engaged in a pattern of neglect or to have acted in bad faith in not complying with its obligations under the written agreement.

(3) The Executive Director shall communicate any decision to revoke approval to the financial institution in writing by certified mail at the address given on the agreement. The revocation notice shall state the specific reasons for the revocation decision and advise of any right to reconsideration or review. The financial institution shall have thirty (30) days from the date of receipt of the written notice to file a written request with the Executive Director seeking reconsideration of the Executive Director's decision or a review of that decision by a panel of

the Committee on Professional Conduct. The financial institution may request a review by either ballot vote of a panel or a public hearing before a panel, following the Procedures. The decision of the panel shall be final and not subject to any review. The approved status of the financial institution shall continue until such time as this review process is final.

(4) Once the approval of the financial institution has been finally revoked, the institution shall not thereafter be approved as a depository for attorney trust accounts until such time as the financial institution petitions the Office for new approval, including in the petition a plan for curing any deficiencies that caused its earlier revocation and for periodically reporting compliance with the plan in the future, and approval is granted.

(5) Within fifteen (15) days of receipt of the notice of revocation, or final order of revocation if reviewed by a panel, of its approved status, a financial institution shall give written notification of the revocation action to all holders of attorney trust accounts on deposit with the financial institution, and file a report with the Office of all such attorney notification contacts within thirty (30) days of the date of receipt by the financial institution of the notice or final order of revocation.

(6) Any attorney or law firm receiving notification from a financial institution that the institution's approval as a trust account depository has been revoked shall remove all trust accounts from the financial institution within thirty (30) days of receipt of such notice or by such later date as is required for the payment of all outstanding items payable from the trust account, and shall send written notice of compliance to the Office, including the name and address of the new trust account depository institution.

(7) Failure of any financial institution, attorney, or law firm to comply with the provisions of Section 28 may be treated as contempt of the Arkansas Supreme Court upon petition by the Office, and punished as such upon a finding of contempt. (Effective May 26, 2011)

RULES PROVIDING FOR CERTIFICATION OF COURT REPORTERS

Section 7. Discipline

(a) **Sanctions.** For violations of this Rule or "Regulations of the Board of Certified Court Reporter Examiners," the Board for good cause shown, and by a majority of four (4) votes from the Board concurring, after a public hearing by the Board, may sanction a reporter by ordering a public admonition, or by suspending or revoking any certificate issued by the Board. In the alternative, the Board, with four (4) votes concurring, may sanction a reporter with a private, non-public admonition. Discipline by consent, as set out in Section 8 of these Rules, may

also be utilized by the Board for any violations of the aforementioned Rule or Regulations.

* * *

(i) **Probable cause determination.** Before a formal Complaint may be prepared on any reporter, the written approval of four (4) members of the Board shall be given to the draft complaint as prepared. Before any formal Complaint may be served on a reporter, it shall be approved by the signature of the Board Chair. (Effective April 14, 2011)

Section 8. Surrender of certificate — Discipline by consent.

* * *

(b) **Discipline by Consent**

* * *

(4) The consent proposal, along with copies of the formal Complaint, and the recommendations of the Board Chair or representative, shall be presented to the Board by written ballot to either accept or reject the proposed disposition. The decision shall be determined by four (4) concurring votes of the Board. The respondent reporter will be notified immediately in writing of the Board's decision. Rejection will result in the continuation of the formal Complaint process. (Effective April 14, 2011)